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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF WISCONSIN,
et al.

Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.

Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The "salary basis test" is used by the United States Department of Labor (USDOL) to define executive, administrative and professional exemptions to the federal overtime compensation law. Its rationale was last examined long before that law was extended to public employers in 1966 and 1974. Responding, in 1992, to public sector concerns over part of that test, USDOL acknowledged it had both thwarted express congressional intent and breached public accountability principles and altered how that part of the test applies to public employers. The court of appeals presumed another part of that test untouched by USDOL in 1992, the disciplinary deduction standard, had validly construed congressional intent. Under that standard, a State must pay overtime compensation to all of its executives and professionals, even though a State may never actually make a prohibited disciplinary deduction, if it reserves any right to suspend those employes except as prescribed by USDOL. The question presented is:

> Should courts conclude Congress intended, under its commerce power, to require States to impose discipline contrary to public accountability standards when accepted statutory construction rules establish Congress never intended that result?

LIST OF PARTIES

The parties to the trial court proceedings below were as follows: the petitioners, the State of Wisconsin, the Wisconsin Department of Transportation, and its Secretary, Charles H. Thompson, the Wisconsin Department of Administration, and its Secretary, James R. Klauser, the Wisconsin Department of Natural Resources, and its Secretary, George Meyer, the Wisconsin Department of Health and Human Services, and its Secretary, Gerald Whitburn, the Wisconsin Department of Industry, Labor and Human Relations, and its Secretary, Carol Skornicka, the Board of Regents of the University of Wisconsin, and its President, George K. Steil, Sr., the Wisconsin Department of Employment Relations, and its Secretary, Jon E. Litscher (the State defendants); the respondents, the United States Department of Labor and its Secretary, Robert Reich (USDOL); and the respondents, Gerald R. Mueller, James A. Andreshak, Frederick Moeller, David Tamblyn, David Dahlk, Melvin Sensenbrenner, Richard Nelson, Roger Bohn, David Buschkopf, Curtis Paulson, Thomas M. Stemrich, Terry D. Cook, Gerard Swim, Robert Grosch, and Vernon Carlson, the State Engineering Association, the named plaintiffs and hundreds of unnamed plaintiffs who consented to be plaintiffs (the Engineers). The named and unnamed plaintiffs are listed in the Appendix at App. 42-45.

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On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The State defendants respectfully request that a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit Court of Appeals which reversed a district court summary judgment in their favor.

OPINIONS BELOW

The opinion of the court of appeals is reported at 54 F.3d 438 (7th Cir. 1995), *rehearing and rehearing en banc denied*. It is reprinted at App. 1-8. The order denying rehearing is reprinted at App. 9-10. The opinion of the district court is reported at 858 F.Supp. 885 (W.D.Wis. 1994). It is reprinted at App. 11-41.

JURISDICTION

The decision issued May 15, 1995. A timely petition for rehearing was filed May 30, 1995. Rehearing was denied July 12, 1995. App. 1. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. §§ 1251(b)(2) and 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Relevant parts of the applicable constitutional provisions, statutes and regulations, being lengthy, are set forth in the Appendix. App. 46-60. S.Ct. Rule 14.1(f). The constitutional provisions are: Article I, Section 8, clause 3 and Article IV, Section 4, of the United States Constitution; Article X and Article XIV, Section 1, of the Amendments to the United States Constitution. App. 46. The federal statutes are: 5 U.S.C. Part 3, Ch. 75 (1978); 5 U.S.C. Part 3, Ch. 75 (1978); 29 U.S.C. § 203; 29 U.S.C. § 207(a)(1); and 29 U.S.C. § 213(a). App. 46-52. The federal regulations are: 5 C.F.R. Part 551, Subpart B; 29 C.F.R. § 541.1; 29 U.S.C. § 541.2; 29 C.F.R. § 541.3; 29 C.F.R. § 541.5d (1991) and 29 C.F.R. § 541.5d (1992). App. 52-60. The Wisconsin Statutes are: §§ 15.001, 16.415, 16.53, 20.923, 111.90, 111.91, 230.01, 230.34, 230.44, Wis. Stats. App. 60-65.

Other material essential to understand the petition are in the Appendix. S.Ct. Rule 14.1(i)(vi). This includes: two non-regulatory federal agency interpretations -- 29

C.F.R. § 541.118 and 29 C.F.R. § 541.314 (App. 66-70), and relevant excerpts from the Federal Register (App. 70-112) and from a 1949 USDOL report on the salary basis test and a 1991 USDOL Letter Ruling (App. 112-117).

STATEMENT OF THE CASE

A. Statement of Facts.

The factual findings of the district court are undisputed. App. 14-18. Through winnowing of issues, only certain facts are now relevant. The engineers, categorized as exempt professionals under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (the FLSA), challenged that status through this lawsuit. For each week the engineers performed work, they were paid a predetermined amount exceeding $500.00. App. 14-15.

Based on a study showing Wisconsin lost skilled engineers to the higher-paying private sector, the engineers have, since 1973 -- before the FLSA was extended to Wisconsin -- received straight time overtime, beyond the predetermined amounts, for work beyond 40 hours a week. Straight time overtime is required by the collective bargaining agreement between Wisconsin and plaintiff State Engineering Association. App. 15.

The engineers must keep accurate records of the time they work to assure this overtime pay is correctly paid and because they work on projects funded by program revenue or federal money. Auditing requirements mandate time be documented and attendance of employes tracked. Wisconsin policy has long required all employees to account for any work absences unrelated to work. App. 15.

Wisconsin imposes uniform discipline on its employes. Differentiating discipline between employes because they are exempt or nonexempt would undermine the validity of the discipline, violate Wisconsin's labor

relations laws, create dissension and morale problems among its work force and violate its employees' state and federal constitutional rights. Wisconsin is obliged to establish fair and reasonable work rules for all employes and to establish and administer a fair and reasonable system of discipline for employees who violate work rules, state law or federal law. In determining discipline in each case, Wisconsin must impose discipline that is fair, proper for the circumstances, and not excessive. App. 16.

During the liability period, only plaintiff Terry Cook and class member David Russell had, or were facing, suspensions without pay for periods other than full workweeks when the district court issued its decision. App. 16 and 32. Plaintiff Cook was facing discipline for claiming sick leave for absences from work when his supervisors did not believe he was sick. During two pay periods, in which he worked no overtime, adjustments were made to his leave accounts for the periods he erroneously claimed sick leave and took no other form of personal leave. Depending on the outcome of a grievance pending when the district court granted summary judgment, he faced a potential suspension without pay as discipline for these improper claims of sick leave, an infraction not involving a safety rule. App. 16 and 32. During one pay period class member Russell received a disciplinary suspension of eight hours without pay for leaving a training session midway during the presentation and not returning to work. During another pay period, his salary was adjusted to account for the time when he was absent from the training session but did not take any form of personal leave. During these two pay periods, he worked no overtime. App. 16.

The district court found Congress could never have intended to apply any part of the salary basis test to public employers. App. 26-39. That application, the district court found, would have conflicted with the public accountability States owed to their citizens and constitutional limitations on congressional power. The district court further found

that accepted statutory construction indicia, including inconsistent positions by USDOL and a consistent rejection of the salary requirement by an agency administering the FLSA as to federal employes, argued against applying the test to public employers. App. 26-39.

The court of appeals found Wisconsin had forfeited the exemption as to all of the engineers simply by asserting it reserved the right to impose suspensions for periods other than for full workweeks for infractions other than safety rules of major significance. App. 5 and 8. *E.g.*, Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995). By extension, this forfeiture of exemptions applies to virtually all of Wisconsin's exempt employes. Even if none of the Engineers had been suspended without pay for other than full workweeks for non-safety rule infractions, the court of appeals would have made that finding. *Id.*

B. History of the FLSA, Exemptions, Salary Basis Requirement, Salary Basis Test and Disciplinary Deduction Standard.

Congress enacted the FLSA in 1938 requiring private sector employes be paid overtime compensation unless exempted by the statute. 29 U.S.C. § 207; Pub.L. 75-718, 52 Stat. 1060 (1938). Since enactment, 29 U.S.C. § 213(a)(1) has exempted executive, administrative and professional employes from those overtime mandates (the exemptions).

In 1966, the FLSA was extended to limited groups of public employers. Pub. L. 89-601, 80 Stat. 830. Until then, it applied only to private employers. In 1974, it was extended to nearly all public employers. Pub. L. 93-259, 88 Stat. 55. The Court held extensions of the FLSA to public employers constitutional (Maryland v. Wirtz, 392 U.S. 183 (1968)), then unconstitutional (National League of Cities v. Usery, 426 U.S. 833 (1976)), and then constitutional (Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528

(1985)) and addressed the extension of the FLSA to public employers one other time (Moreau v. Klevenhagen, 508 U.S. ___, 113 S.Ct. 1905 (1993). The Court has not analyzed how the exemptions apply to public employers. *Id.*

Legislative history confirms Congress intended that public employers not be required to pay overtime compensation to their executive, administrative and professional employes. *See* App. 24-25, 108. As the district court noted, Congress may have recognized requiring States to pay executives and professionals overtime compensation could exceed constitutional limits. App. 25 citing to Merritt, "The Guarantee Clause and State Autonomy: Federalism for a Third Decade", 88 Colum.L.Rev. 1, 56-57 (1988).

"Salary", as a criterion for the exemptions, has varied. For two years after enactment, USDOL required executives be paid a minimum amount, though not salary, and had no payment criteria for professionals. App. 70. In 1940, USDOL created a regulatory salary requirement. App. 56-59 (29 C.F.R. §§ 541.1, 541.2 and 541.3); App. 71-72. The articulated reasons for this requirement have been that employers in 1940 said it was easy to use and employers in 1949 said it was a "universal" way to pay exempt employes. App. 92, 112-15; Craig v. Far West Engineering Co., 265 F.2d 251, 259 n.11 (9th Cir. 1959); Brock v. Claridge Hotel and Casino, 846 F.2d 180, 185 (3rd Cir. 1988).

USDOL elaborated on the salary requirement through a non-regulatory interpretation called the "salary basis test". App. 66-69 (29 C.F.R. § 541.118 in 29 C.F.R. Part 541, Subpart B). *See also* App. 72-73, 75-76. That test contains a "disciplinary deduction" standard. 29 C.F.R. § 541.118(5). Under this standard, employers lose exemptions if they deduct pay, in increments less than full workweeks, for disciplinary reasons other than "safety violations of major significance". 29 C.F.R. § 541.118(5).

Though 29 C.F.R. § 541.118(5) seems to bar all non-safety rule disciplinary deductions regardless of length, full workweek non-safety deductions are allowed. 29 C.F.R. § 541.118(a) (employes need not be paid for a workweek in which no work performed); App. 66, 68, 115-17. For employes working five-day weeks, non-safety suspensions for three days, twelve days or twenty-four days would all be unacceptable. *Id.* USDOL also bars, regardless of work needs, suspending an employe as non-safety rule discipline for one or two days each week for several weeks. *Id.*

Before 1954, this standard varied. During and after World War II, companies could deduct pay for absenteeism without losing exemptions. App. 25, 113-14. A 1949 hearing report concluded that this absenteeism provision was "cumbersome" and rarely used, that discipline of exempt employes was itself rare and that the conditions justifying the provision were over. *Id.* Nonetheless, proposed amendments to the salary basis test based on the 1949 report would have allowed deductions for "major disciplinary reasons." App. 72-73. This was deleted from the final interpretation because of undisclosed "comments." App. 73. Since 1954 the disciplinary deduction standard has been unaltered and unexamined. App. 68, 73, 105-06.

Starting in 1974, the Civil Service Commission administered the FLSA as to most federal employers. App. 76-77. It developed instructions in 1974 and promulgated a regulation in 1975 which, "integrating exemption criteria with Federal classification systems to the extent possible", eliminated salary as a criterion and focused instead on duties. App. 76-82. The Commission, and its successor the Office of Personnel Management (the OPM), reaffirmed, in subsequent rulemaking, that eliminating salary as a criterion was more logical in the public sector. *E.g.*, App. 82-83, 85. It continues to exclude salary, and disciplinary deductions, as a criterion for determining exemption status. App. 52-56.

USDOL administered the FLSA as to State and local employers. Between the stay issued in 1974 (National League of Cities v. Brennan, 419 U.S. 1321, 1323 (1974)) and Garcia issuing in 1985, USDOL did not address how FLSA exemptions applied to public employers. In 1985, USDOL recognized problems between civil service systems and its exemption criteria and began considering whether its salary requirement should, as with federal employes, be abandoned. App. 83-85. All subsequent inquiries into the rationale of the salary requirement, the salary basis test and the disciplinary deduction standard have, in the intervening ten years, been deferred to "a later date" through citation to this separate ongoing reconsideration by USDOL. App. 85-86, 90, 95-96, 99, 102, 111.

In 1991 USDOL focused on conflicts between parts of the salary basis test and leave accounting systems maintained by public employers. App. 86-91. It did not question whether the disciplinary deduction standard in the test should apply to public employers. App. 60, 86-91. In 1992, USDOL, noting unsolicited receipt of comments on the disciplinary deduction standard, stated it was "not open for comment" and would be addressed "at a later date." App. 111. USDOL declined to alter the standard as to public employers. App. 110-111.

The concept of "salary" does not appear in the statute (29 U.S.C. § 213(a)(1)) or the legislative history of the 1966 and 1974 amendments. 1966 U.S. Code & Admin. News 3002; 1974 U.S. Code & Admin. News 2811. The decisions of this Court on the extension of the FLSA to public employers have mentioned neither the salary requirement, the salary basis test nor the disciplinary deduction standard. *See* Maryland, 392 U.S. at 185-205; National League, 426 U.S. at 833-881 (1976); Garcia, 469 U.S. at 528-589; Moreau, 123 L.Ed.2d at 590-97.

REASONS FOR GRANTING THE WRIT

Congress never intended to exercise its commerce power to require States to impose discipline on their employes contrary to public accountability standards.

A. **The court of appeals decision undermines the federal-state balance by presuming that an outdated agency interpretation expresses subsequent congressional intent.**

The decision by the court of appeals undermines the delicate balance between the federal and State sovereignties protected by a web of constitutional provisions. It permits the federal government to micromanage how States relate to their own employes. This is an area the Founders knew to be at the heart of sovereignty and public accountability -- the control of official misconduct through their pay. The decision presumes Congress intended to force States either to impose discipline not commensurate with the underlying official misconduct, and breach their duty of accountability to their own citizens, or to pay federally mandated overtime compensation to all of their executives and professionals.

This stunning result is not grounded on anything in the statute or the legislative history. 29 U.S.C. § 213(a)(1); 1966 U.S. Code & Admin. News 3002; 1974 U.S. Code & Admin. News 2811. All accepted statutory construction rules argue against it. Pp. 13-15 *infra*. The court of appeals defers to an outdated non-regulatory agency interpretation, as if it were a regulation rather than applying the proper standard of searching such interpretations for consistency and internal persuasiveness. Pp. 15-17 *infra*. While declaring any possible rationale for the disciplinary deduction standard "pretty feeble" as applied to public and private employers (App. 8), the court of appeals fails to recognize that USDOL, in its rulemaking and interpretative

roles, never articulated a rationale for it.[1] The decision ignores USDOL last reviewing the validity of the salary requirement, and its components, in 1954 and consigning further review, in 1985, to indefinite future study. App. 83-84, 85-86, 90, 95-96, 99, 102, 111.

It ignores that Congress created a disciplinary structure for federal employes antithetical to the disciplinary deduction standard. Pp. 17-18 *infra*. It ignores that the Civil Service Commission and the OPM, charged with applying the FLSA to most federal employers, consistently, by regulation, rejected USDOL's entire salary requirement as inconsistent with public employment. It ignores USDOL itself admitting, while rulemaking in 1992, that using its salary basis test against public employers had been contrary to the intent of Congress during the many years USDOL was charged with applying the FLSA to the public sector. App. 102, 104, 106-07, 108.

The court of appeals decision also creates an indirect conflict in the circuits. The Ninth Circuit Court of Appeals, based solely on the 1992 admissions by USDOL, concluded the salary basis test, as applied to public employers, was "invalid in its entirety" prior to 1991 because it was contrary to congressional intent. Service Employees Int'l Union, Local 102 v. County of San Diego, 35 F.3d 483, 489 (9th Cir.

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[1]The only attempted articulation in USDOL's interpretive role was deleting a proposed allowance for deductions based on "major disciplinary reasons" in 1954 because of unspecified "comments". App. 72-73. In 1992, while belatedly trying to remedy how applying other parts of the salary basis test to the public sector defeats congressional intent, USDOL expressly refrained from analyzing whether the standard had any rationale. App. 110-111. Even returning to the 1949 Weiss Report, the only rationale is perceived administrative convenience and a rarity, amongst the private employers then covered, both in suspensions for non-safety reasons and in disciplining exempt employes at all. App. 112-115.

1994), *amended and superceded on denial of rehearing*, 60 F.3d 1346, 1353 (9th Cir. 1995). *See also* Stewart v. City and County of San Francisco, 834 F.Supp. 1233 (N.D.Cal. 1993). Though Service Employees was analyzed extensively in the briefs, the court of appeals does not cite it.[2]

The court of appeals decision defers to the USDOL interpretation even though it creates, rather than resolves, serious constitutional concerns. Pp. 18-29 *infra*. It dismisses those concerns without the respect they not only deserve, but command. Characterizing as "silly" the rights of State employes to Due Process under the Fourteenth Amendment to the United States Constitution, it discerns no difference between analyzing Congressional interference with disciplinary options of State employers rather than those of private employers. App. 7. *See* pp. 18-29 *infra*.

The court of appeals misfocuses its constitutional analysis by skeptically wondering why States can not follow USDOL's directions, It does not independently analyze whether the delicate and vital boundaries of dual

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[2]Service Employees at 60 F.3d 1346 issued after the court of appeals, in Mueller, denied rehearing. Since the liability period in Service Employees ended in April 1991, the court was not asked to analyze applying 29 C.F.R. § 541.5d to any facts. 35 F.3d at 485, 60 F.3d at 1349. Applying the disciplinary deduction standard in the public sector was also not involved. *Id.* Service Employees, comparing USDOL's failure to consider public accountability requirements until September, 1991 with its efforts thereafter, ventured, in *dicta*, that the 1992 rule may have properly amended the salary basis test to take public accountability principles into account. 35 F.3d at 489, 60 F.3d at 1353. With Service Employees holding, however, that it was "entirely invalid" and contrary to congressional intent to apply any part of the pre-1992 salary basis test to public employers, and with Mueller holding that any part of that test left over after USDOL's 1992 rulemaking was presumed valid, there is at least an indirect conflict in the circuits.

sovereignties have been breached. Dismissing Guarantee Clause concerns, for example, the court improperly narrows its focus to observing the plaintiffs are "engineers", perhaps suggesting a State is not accountable to the public in employing engineers. App. 7. Regardless of the validity of this suggestion, the court of appeals fails to appreciate that, since Wisconsin maintains a "policy of imposing uniform discipline upon all employees" (App. 16), the court's ruling extends to **all** Wisconsin executive and professional employes except those few excluded from FLSA coverage by Congress under 29 U.S.C. § 203(2)(C) (App. 51) or from salary requirement coverage by USDOL interpretations under 29 U.S.C. § 541.314 (App. 70).[3] Unless Wisconsin surrenders to USDOL its uniform discipline policy covering all employes, it would lose all exemptions which, given these exclusions, would require that persons not appointed by elected officials (29 U.S.C. § 203(2)(C)), such as the President of the University of Wisconsin System and the Chancellors and Provosts of the various universities (§ 36.09, Wis. Stats.), would have to be paid federally-mandated overtime compensation. The faculty, being teachers, would not. 29 C.F.R. § 541.314. Vast Wisconsin taxpayer resources would have to be expended in back pay alone, as well as future overtime compensation, as to employes Congress never intended to cover.

The court of appeals properly recognizes "Americans are suspicious of their public servants", that they "demand "'public accountability' for every minute, or at least every hour" for which they are paid and that this principle "is deeply embedded in the American political culture." App. 6. It does not recognize the constitutional significance in the federal government forcing a State, as a wholesale

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[3]Elected officials and certain of their appointees and advisors were excluded by 29 U.S.C. § 203(2)(C). App. 51. USDOL itself excepts attorneys, doctors and teachers from the salary requirement. 29 C.F.R. § 541.314. App. 70.

matter, to pay all of its employes overtime compensation merely because it reserves the right to impose disciplinary suspensions commensurate with infractions. Courts should not presume Congress intended to "require States to govern according to Congress' instructions." New York v. United States, 505 U.S. ___, 112 S.Ct. 2408, 2420 (1992).

If a public employer determines one of its law enforcement employes, violating work rules drafted to avoid corruption, breaches the public trust by accepting free food and if the proper sanction is less or more than a full workweek, the proper sanction should be imposed. Instead, State and local employers across the country are faced with the "Hobson's Choice" (App. 35, n.2) of toeing the line drawn by USDOL -- imposing discipline not commensurate with the misconduct -- or entirely losing their FLSA exemptions. *E.g.*, Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995). As will be seen, Congress could never have constitutionally intended such results. As will be noted first, Congress never did.

B. All accepted rules of statutory construction run against concluding that Congress intended to undermine the federal-state balance by applying the disciplinary deduction standard to public employers.

Statutes designed to safeguard public funds, such as Wisconsin statutes potentially threatened by USDOL's disciplinary deduction standard (*e.g.*, App. 60-65), are to be strictly construed in favor of that goal. 3 Sutherland Stat. Const. § 58.04, p. 79 (5th ed. 1992 rev.). Statutes in derogation of sovereignty, which this Court's decisions in Maryland, National League and Garcia plainly show is the critical question, are construed strictly against the individual and in favor of sovereignty. *Id.*

Which agency view of the salary requirement, and its offshoot, the disciplinary deduction standard, expresses

congressional intent: the view of the Civil Service Commission and OPM that no salary requirement applies to the public sector or the view of USDOL that it does? All accepted factors, such as pronouncements concurrent with congressional action and agency consistency, favor the view of the Civil Service Commission and OPM. 2B Sutherland Stat. Const. § 49.03, p. 7, § 49.04, p. 12 (5th ed. 1994 rev.).[4] USDOL's inaction does not trump any of those factors. "Administrative inaction" connotes no agency conclusion unless it clearly resulted from "carefully considered interpretation" rather than "inattention." 2B Sutherland Stat. Const. § 49.05, pp. 21-22 (5th ed. 1994 rev.) (emphasis added). USDOL never articulated a rationale for concluding that Congress intended the disciplinary deduction standard to apply to public employers. Its inaction can hardly be viewed as a "carefully considered interpretation."

Congress is presumed to have acted constitutionally and, where one construction involves serious constitutional difficulties, that interpretation should be rejected. 2A Sutherland Stat. Const. § 45.11, pp. 48-49 (5th ed. 1992 rev.). Even if the only construction which saves a statute from unconstitutionality is a strained one, accepting it is not only permitted but desirable. 2A Sutherland Stat. Const. § 45.11, p. 49 (5th ed. 1992 rev.). In choosing among competing interpretations, courts are not restricted to being concerned about constitutionality. 2A Sutherland Stat. Const. § 45.12, pp. 61-63 (5th ed. 1992 rev.). Courts also choose the most rational and sensible construction. *Id.* It requires no strain of statutory language to conclude Congress never intended,

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[4]As an advocate, the United States Government, confronted with the USDOL salary standards by a litigant seeking overtime compensation, understood that very few federal employes are paid on a salaried basis and persuaded the court that "it was clearly not Congress' intention to include the entire Federal work force under the FLSA." Roney v. United States, 790 F. Supp. 23, 26 n.2 (D.D.C. 1992).

in the public sector, that salary be a criterion to obtain the exemptions, much less intended the disciplinary deduction standard to bind the hands of States. 29 U.S.C. § 213(a)(1). As will be seen, finding such intent creates serious constitutional concerns and must be rejected.

C. The decision undermines the federal-state balance by improperly deferring to a non-regulatory interpretation as if it were a regulation.

The decision incorrectly defers to the disciplinary deduction standard as if it were a "regulation" entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and abdicates the judiciary's proper role by over-applying even that generous standard. App. 5-6. The proper standard was set forth in Skidmore v. Swift & Co., 323 U.S. 134 (1944). It held USDOL's non-regulatory interpretations of the FLSA assist in discovering Congressional intent only if they evidence thorough consideration and valid reasoning, are consistent with other agency pronouncements and present "all those factors which give it power to persuade." *Id.* at 140.

Skidmore persuasiveness standards -- not Chevron deference -- govern USDOL "interpretations" like the salary basis test.[5] Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1071-72 (1st Cir. 1995); Reich v. New York, 3 F.3d 581, 587 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 1187 (1994). The court of appeals, examining 29 C.F.R. § 541.118 as to private employers before Mueller, recognized that Skidmore standards apply to the salary basis test. Klein v.

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[5]The Ninth Circuit, addressing whether Congress ever intended to apply the salary basis test to public employers, improperly applied Chevron deference and **still** concluded Congress never intended any such thing. Service Employees, 35 F.3d at 487-89, 60 F.3d at 1351.

Rush-Presbyterian-St. Lukes Medical Center, 990 F.2d 279, 283-84 (7th Cir. 1993); Tripp v. May, 189 F.2d 198, 201 (7th Cir. 1951). Unless the "grounding" of the non-regulatory interpretation is clear from examining the interpretation itself, it receives no weight. John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank, 114 S.Ct. 517, 529 (1993). *See also id.* at 529-31 n.5 (Thomas, O'Connor and Kennedy, JJ., dissenting) (recognizing Chevron deference unavailable to non-regulatory interpretations).

The disciplinary deduction portion of the salary basis test can not survive Skidmore analysis. The standard conveys no inherent persuasiveness since USDOL has never, in its rulemaking or interpretative roles, articulated a rationale for the standard. Viewed as part of the salary basis test, the standard is actually inherently illogical. Part of that test allows an employer to deduct a day's pay when an employe is absent for a day to handle "personal affairs" such as, for example, the funeral of a parent. 29 C.F.R. § 541.118(2). If that employe lied about the funeral to attend a ballgame, the same employer would entirely forfeit that exemption by suspending the employe without pay for a day as discipline. 29 C.F.R. § 541.118(5). The failure by USDOL to discharge its duties, by long ago eliminating the disciplinary deduction standard, "'should not be permitted to stand in the way of a correct administration of the law." John Hancock, 114 S.Ct. at 529.

Even where a USDOL interpretation is entitled to Chevron deference, it is rejected where USDOL impedes on territory properly lying with the courts for resolution. Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) ("refusing to sanction '"unauthorized assumption by [USDOL] of major policy decisions"'" and noting "'an agency may not bootstrap itself into an area in which it has no jurisdiction'"). USDOL's 1992 rulemaking commentary clarifies it tried to preserve pieces of its salary basis test as applied to the public sector by making major policy decisions beyond its authority to make. In doing so, it also

assumed the judiciary's mantle of evaluating where the boundaries lie between a State's public accountability duties and Congress's commerce powers. App. 91-112. USDOL can not usurp the roles of either Congress or the courts.

D. Congressional intent toward disciplining public employes appears from how it treats federal employes.

Federal employers may suspend employes without any regard to restrictions involving either "full workweeks" or "safety rules of major significance". App. 46-50. During the same time period it extended the FLSA to public employers, Congress enacted statutes authorizing all varieties of official misconduct to be addressed by a wide range of suspensions. App. 46-51. Congress would not have created a detailed structure assuring suspensions of federal employes were rational and tied to the underlying misconduct while, at the same time, preventing States from doing the same. App. 46-51.[6] *See* App. 73 and 82.

On September 6, 1966, three weeks before extending the FLSA to some federal employers, Congress expressly allowed all federal employes in the competitive service to be suspended without pay based on "such cause as will promote the efficiency of the service." App. 47. The time periods it authorized were wholly unconnected with USDOL's "full workweek" standard. App. 46-51. The resultant Civil Service Commission rules on suspensions were recognized as important means of being "certain that

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[6]The court of appeals also ignored an extensive presentation in an *amicus curiae* brief filed by the State of Washington, concurred in by the National League of Cities, showing that nearly all States and countless local governments expressly provide by statute or ordinance for suspensions without pay for less than full workweeks based on infractions other than safety rules. State of Washington brief, pp. 9-11, nn. 6 & 7.

the proposed [disciplinary] action is appropriate." Magers, "A Practical Guide to Federal Civilian Employee Disciplinary Actions," 27-100-77 Mil. L. Rev. 71 (1977). Not only are suspensions authorized for infractions far beyond "safety violation, Congress, in amending this statute in 1978, expressly allowed suspensions for anywhere from one to fourteen days based on repeated "discourteous" behavior towards the public. App. 47. The courts, implementing Congress' clear intent, routinely examine if the discipline imposed on federal employes is commensurate with the misconduct. *E.g.* Gellerman v. Nimmo, 704 F.2d 1004, 1006 (7th Cir. 1983); Pascal v. United States, 543 F.2d 1284, 1289-90 (Ct. Claims 1976) (penalty not too severe); Crowley v. United States, 527 F.2d 1176, 1191 (Ct. Claims 1975).

Congress has likely known how the public sector employes it interacts with, federal employes, were treated under the FLSA and under the discipline structure Congress created. There is no evidence Congress ever intended the result produced by the court of appeals decision: that States are prohibited for suspending their employes with the same public accountability that Congress recognizes it owes its citizens. The court of appeals does not mention the federal disciplinary structure in discerning Congressional intent to impose a vastly different one on the States.

E. The disciplinary deduction standard undermines the federal-state balance by depriving States of the vital tool of progressive discipline in ways that implicate constitutional rights.

Suspensions without pay are ordinarily imposed as part of "progressive discipline" which seeks to correct misconduct, rather than punish, by rationally assessing discipline appropriate to both the severity of the misconduct and the prior disciplinary history. *See, e.g.*, NLRB v. Chicago Typographical Union No. 16, Communications Workers of America, AFL-CIO, 974 F.2d 933, 938 (7th Cir.

1992); Warren v. Stone, 958 F.2d 1419, 1421 (7th Cir. 1992); Tennes v. Dep't of Revenue, 944 F.2d 372, 379 (7th Cir. 1991); Fleming v. County of Kane, 898 F.2d 553, 555 (7th Cir. 1990). Public employers are subject to the Due Process and Equal Protection Clauses in many transactions with their employes. The existence of progressive discipline policies is often a significant factor in evaluating constitutional challenges to disciplinary steps taken by public employers. *See, e.g.*, Glass v. Dachel, 2 F.3d 733, 737 (7th Cir. 1993); Black v. Barnett, 999 F.2d 1295, 1296 (7th Cir. 1993); Warren, 958 F.2d at 1421; Fleming, 898 F.2d at 555; Lee v. County of Cook, 862 F.2d 139, 141 (7th Cir. 1988). *See also* Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

Equal protection violations are shown through proof of "intentional discrimination against [the plaintiff] because of [the plaintiff's] membership in a particular class." Personnel Administrator v. Feeney, 442 U.S. at 279. Categorization of employes as exempt or non-exempt for FLSA purposes may not furnish a rational basis for differential discipline responsive to the same conduct by otherwise similarly situated employes -- particularly where a State's policy calls for progressive discipline and for tying discipline to the misconduct. If differently treated exempt and non-exempt employes also happen to differ by sex or race, the State's rationale would be subjected to strict scrutiny and distinctions even harder to justify.

Congress could not have intended, by extending the FLSA to all public employers, to create substantial disparities in the discipline imposed upon public employes based on their membership in the classes of being either "exempt" or "non-exempt" under the FLSA. Assume two State employes possess similar employment profiles. Each engages in misconduct sufficiently similar that any reasonable employer would impose a two-day suspension without pay on each employe. If the State employer is precluded from imposing suspensions on one employe only because that employe is exempt, the State employer is left

with the options of either a reprimand or a more severe suspension. If the exempt employe is reprimanded while the non-exempt employe is given a two-day suspension, the equal protection rights of the non-exempt employe may be implicated. By contrast, if the exempt employe is given a five-day suspension while the non-exempt employe is just given a two-day suspension, the equal protection rights of the exempt employe may be implicated.

For Congress to require States to impose discipline other than what is proper would disrupt more than the federal-State balance. The balance between the State government and its citizens could be disrupted as citizens learn of, and react to, discipline not commensurate with the misconduct. The balance between the State government and its employes, on which the concept of progressive discipline relies, would be disrupted as well. If an employer responds too leniently to misconduct, the employe may be lulled into future misconduct. If an employer responds too harshly, the relationship may be ruptured. The disciplinary deduction standard does more than destroy progressive discipline by depriving public employers of a particular disciplinary tool in their "arsenals of disciplinary remedies" (App. 7) which they should not have to surrender. More importantly, it distorts and vitiates the vital corrective messages which wayward employes must receive in the right dose in order to return to proper public service.

F. The power to control official misconduct through pay is a vital component of sovereignty.

The Founders knew the ability of governments to impose monetary sanctions on their employes for misconduct was central to both being accountable to their citizens and meaningful governmental entities. *E.g.*, E. Ferguson, The Power of the Purse: A History of American Public Finance, 1776-1790 xiv-xv (1961). "The power of the purse was to them the determinant of sovereignty". *Id.*

The Revolution was largely a struggle over central or local control of public officials. *E.g.*, Nelson, "A Short, Ironic History of American National Bureaucracy", 44 J. Politics 747, 750 (1982). The "country was conceived as much in anger as in liberty" over Britain's appointed officials serving "'at colonial expense.'" *Id.* The Declaration of Independence charged the King "'sent hither swarms of officers to harass our people and eat out their subsistence'"). *Id.*; A. Schlesinger, Prelude to Independence 12-13 (1958); Freytag v. C.I.R., 501 U.S. 868, 905, n. 4 (O'Connor, J, concurring).

By the mid-1600's "the distinction between local and central authority became clear" and colonial leaders battled "with every weapon" to reduce the power of royal officers. Bailyn, "Political and Social Structure in Virginia" Seventeenth Century America: Essays in Colonial History 102, 113 (J. Smith, ed. 1959). During the 1700's, colonists understood that, absent appointive authority, controlling an official's pay effectively governed the official. Britain, requiring the colonies to pay the officers it appointed, strived to also require the colonies to pay fixed amounts. *E.g.*, 1 H. Osgood, The American Colonies in the Eighteenth Century 155-56 (1924); 3 Osgood at 323-24. The locally-elected assemblies instead assumed authority over the officials by controlling when and how much they were paid. *Id.* 1 Osgood at 155-56; 3 Osgood at 323-24; 4 Osgood at 128.

The assemblies developed three vital means to control royal officials: (a) ignoring fixed amounts required by Britain and deciding for themselves how much to pay; (b) evaluating proper amounts **after** services were rendered; and (c) suspending or reducing pay in response to perceived misconduct. 2 Osgood at 132; 3 Osgood at 322; 4 Osgood at 53. Assemblies strenuously asserted, for decades before the Revolution, that the amount and timing of those payments were assembly decisions. 1 Osgood at 155-56; 2 Osgood at 132-34, 136, 138; 3 Osgood at 215, 313, 322, 558-59; 4 Osgood at 12, 20, 53, 123-24, 128, 230. Assembly members who

challenged assembly efforts to control payments to officials were themselves disciplined. 2 Osgood at 100.

Displeased with the Pennsylvania Governor, its assembly "stopped" his salary until he complied with its directions. 4 Osgood at 60, 66. The New York assembly, upset with a chief justice, "reduced" his salary. 2 Osgood at 426-27, 429-30. The Governor resisted but finally agreed with this reduction. *Id.* The New York assembly reduced the pay of other officials for similar reasons. *Id.* at 430.

Colonists were familiar with actual suspensions effected by Governors holding disciplinary power. Two North Carolina council members were suspended for misuse of public funds. 4 Osgood at 211. Five New York council members were suspended for corruption. 1 Osgood at 273. A Virginia deputy auditor was suspended for dragging his feet in keeping account books. 2 Osgood at 242. Assemblies also asked Governors to suspend officials. 2 Osgood at 56.

The power assemblies assumed over payments to officials was perceived as highly inappropriate by advocates of strong centralized government. A former governor complained to Britain that assemblies having "withheld or reduced [an official's pay] on occasions where they have had reason to disapprove...[of] his conduct" had rendered the "officers of the Crown dependent on and governed by the assemblies." T. Pownall, The Administration of the Colonies (1764) in 2 The Annals of America 98, 102 (1968). Former Governor Pownall objected to the diminution of the central government while acknowledging the rationale behind assembly control over pay issues was to "prevent the misapplications of public money." *Id.* Other governors complained the power to discipline officers had, by these methods, been usurped by the assemblies. 4 Osgood at 143.

In reaction, Britain, through the Townshend Acts, imposed taxes "to support the governors and judges in those

colonies where assemblies wielded their power to withhold salaries as a club over royal officials." L. Gipson, The Coming of the Revolution: 1763-1775 174-75 (1954). The Revolution nearly began then with Samuel Adams asserting the battlecry of "taxation without representation" and claiming that removing pay decisions from the colonies would violate the British Constitution. *Id.* at 185-86. By backing away from this part of the Townshend Acts, Britain delayed the outbreak of war for several years. *Id.* at 186-95.

Suspending pay of officials was recognized by the Founders as a good tool to control misconduct. In the 1790's postal carriers had pay deducted for late deliveries and tax commissioners were fined for missing meetings. L. White, The Federalists: A Study in Administrative History 184, 426 (1948). Both in colonial and later times, progressive discipline was used. *Id.* at 425-26; 2 Osgood at 122.

The colonies had developed governmental skills it took the fledgling federal government decades to develop. Ferguson, at 48-49, 50-51, 52-53, 100-101; Gipson at 27 (as of 1763, "the ability of the colonists to manage their own governmental affairs with competence and economy is indicated on every hand by a study of local and provincial records"). They sought to retain that ability by authorizing Congress to declare independence while expressly reserving the regulation of internal concerns. *E.g.* "The States and the Congress Move Towards Independence," 6 Publius 135, 139, 142 (Winter 1976). The States came into the union prepared to discipline their own officials in accordance with principles of public accountability. The Founders would have considered it inconceivable to construe the commerce power as allowing Congress -- much less a federal agency -- to usurp that vital indicia of sovereignty from the States.

G. Had Congress intended the disciplinary deduction standard to apply to State employers it would have exceeded its constitutional boundaries.

The interactions between the internal constraints of the Commerce Clause, Congress's affirmative duties under the Guarantee Clause and the protections of Tenth Amendment must be considered in determining whether Congress could have intended to prohibit States from suspending their employes in the same manner Congress authorized federal agencies to do. U.S.Const., Art. I, § 8, cl. 3, Art. IV, § 4 and Amend. X. Had Congress intended such a thing, it would plainly have overstepped its authority.

The disciplinary deduction standard -- an offshoot of the salary requirement -- cannot coexist with the public accountability which Wisconsin and other public entities owe to their constituents as sovereigns under the Constitution. The Civil Service Commission and OPM long recognized the conflict by abandoning the salary requirement. The court of appeals admitted it is a deeply embedded principle in American culture that the taxpayers demand accountability from all public servants (App. 6) yet presumed Congress would usurp the ability of States to be accountable as to a central issue, local control of official misconduct, that made the colonists and the Founders rebel.

The court of appeals improperly focuses on its own inability to perceive why States do not surrender, to the will of USDOL, their ability to determine how and whether to discipline their own employes. The correct focus is that the web of constitutional provisions implicated preclude Congress, not to mention USDOL acting as a legislator, from forcing States to surrender a power States reserved through the Tenth Amendment and which Congress must affirmatively protect through the Guarantee Clause. Once it is assumed that a federal agency, through non-regulatory

interpretations of a Congressional exercise of the commerce power, can force a State to discipline its employes in ways disconnected to the underlying misconduct, the surrender is complete. States could thereafter maintain their disciplinary structures, and other tools for assuring public accountability, only at the pleasure of those federal agencies.

The Commerce Clause (U.S.Const., Art. I, § 8) is the only constitutional ground for extending the FLSA to the States. Garcia, 469 U.S. at 530. On the "unsteady path" this Court has traveled in examining constitutional challenges to this extension, the Court has been directed to the Tenth Amendment (U.S.Const., Amend X). New York, 112 S.Ct. at 2420. The limitations which Congress' affirmative duties under the Guarantee Clause (U.S.Const., Art. IV, § 4) place on how the FLSA applies to the States have not been examined. As will be seen shortly, they are considerable.

Garcia held that detecting the line between mandates to States permissible under the commerce clause and impermissible under the Tenth Amendment should be left to the political process. 469 U.S. at 553-54. The Court has since recognized the Tenth Amendment, a restraint upon Congress' power, can not properly be left to Congress to enforce. *See, e.g.*, New York, 112 S.Ct. at 2420, 2423-25; Gregory v. Ashcroft, 501 U.S. ___, 111 S.Ct. 2395, 2398-2402 (1991); U.S. Term Limits v. Thornton, 514 U.S. ___, 115 S.Ct. 1842, 1852-60 and 1872-75 (Kennedy, J., concurring) (1995).

The Court also recently reaffirmed the Tenth Amendment does impose genuine limits on the scope of the commerce clause. United States v. Lopez, 514 U.S. ___, 115 S.Ct. 1624 (1995). Part of the restraint the Tenth Amendment telegraphs to Congress and the courts is that the "accountability of...state...officials [must] not be diminished." New York, 112 S.Ct. at 2424. Where a State is forced to take action because Congress has overreached, the accountability of both the State and federal governments are diminished because the anger with which citizens might

respond would be misdirected. *Id.* In that sense, to the extent the federal government forces States to impose discipline on their own employes not commensurate with the misconduct, adverse citizen reaction will not likely be directed towards the instigator, the federal government. If a State loses litigation challenging disparate treatment caused by federal restraints on the State's disciplinary process, adverse citizen reaction will likely focus on the State, not the federal, government.

Principles of federalism are abridged where the federal government micromanages how public employers exercise their powers to discipline employes. Rizzo v. Goode, 423 U.S. 362, 367 (1976). A major reason the Founders created dual sovereignties was to increase the motivation of officials to perform well for the public through competing healthy governments. Yarbrough, "Federalism in the Foundation and Preservation of the American Republic", 6 Publius 43, 55 (1976). With the federal government telling States, through the court of appeals decision, not to impose proper discipline, the assault on federalism here is more direct than most. Lopez holds the Commerce power may not be used to "'effectually obliterate the difference between what is national . . . and local and create a centralized government,'" that the Court's decisions on Congress's extension of the FLSA to public employers themselves warned of limits to the Commerce power and that defining those limits is "'necessarily one of degree.'" 115 S.Ct. at 1629 and 1633. Based on the interplay between the Commerce Clause and the Tenth Amendment alone, applying the standard to the States is suspect.

More than the Tenth Amendment is implicated. Congress has an affirmative duty, under the Guarantee Clause, to assure States have republican forms of government (U.S.Const. Art. IV, § 4). *E.g.*, Highland Farm Dairy v. Agnew, 300 U.S. 608, 612 (1937). New York reiterated the confines the Guarantee Clause imposes on Congress's mandates on state government while noting

Congress had not exceeded those confines there because it merely provided monetary incentives to the States, rather than mandates which would impinge on the Guarantee Clause. New York, 112 S.Ct. at 2432-33. The "Hobson's choice" presented to the States here is hardly an incentive.

A brief word about the "nonjusticiability" of the Guarantee Clause is in order. Though the Court has hesitated to referee internal political disputes between warring factions within a State, the Guarantee Clause has the added purpose of preventing Congress from impeding the ability of States to maintain their own chosen "republican forms of government" and, in that area, courts are the proper arbiters of where federal authority stops and State authority begins. *Id.* Examining those limits in a Guarantee Clause rather than Tenth Amendment context alters the analysis. Unlike the passive restraints conveyed by the Tenth Amendment, the Guarantee Clause imposes an affirmative constitutional duty on Congress. While the Court has perceived restraints yielding to a power (*E.g.*, Garcia), an affirmative duty should not so readily yield to a power. Doubts should favor the duty being served rather than the outer contours of the power being expanded.

In any event, the Court would not be not required to find Congress violated the Guarantee Clause. It would simply determine whether Congress intended to do so. Justice may be blind. Judges need not, and should not, be. The district court merely noted, applying accepted principles of statutory construction, that Congress could not have intended to violate the Guarantee Clause in extending the FLSA to State employers. Determining intent is not deciding internal political questions. *E.g.*, Minor v. Happersett, 88 U.S. 162, 175-76 (1875).

What effect does the web of constitutional provisions protecting a State's exercise of its public accountability duty from interference have on how the disciplinary deduction standard affects Wisconsin as an employer? It is direct and

clear. Wisconsin accounts to its citizens through a statutory structure which would be rendered toothless by the court of appeals decision. It grounds its organizational structure on the Guarantee Clause. App. 60-61 (§ 15.001(1), Wis. Stats.). It declares its executive branch must be operated efficiently to use tax dollars effectively. App. 61 (Sec. 15.001(2), Wis. Stats.). Fiscal officials, at their own peril and subject to audit, verify employes are being properly paid according to the law. App. 61-62 (§§ 16.415 and 16.53, Wis. Stats.). Wisconsin allows taxpayers to seek recovery of improper payments in recognition that the government, and each of its employes, works for the people. App. 61-62 (§ 16.415(3), Wis. Stats.) It maintains a detailed salary structures, expressly excluding overtime compensation, for its executives. App. 63 (§ 20.923, Wis. Stats.) To assure suspensions without pay are corrective rather than punitive, and return wayward employes to efficiently serving the public service, those suspensions must be based on "just cause." App. 65 (§§ 230.34 and 230.44, Wis. Stats.). This fulfills many policies, including "fair treatment based on the value of each employe's services." App. 64 (§ 230.01, Wis. Stats.). To protect the integrity of the disciplinary process, it is expressly excluded as a collective bargaining issue. App. 63-64 (§§ 111.90 and 111.91, Wis. Stats.).

Wisconsin has developed the means to account to its citizens. The court of appeals decision would take those means away. The boundaries of the Commerce power stop where a State's ability to account to its citizens, which Congress must affirmatively preserve under the Guarantee Clause and not invade under the Tenth Amendment, is curtailed. The court of appeals should first have determined the USDOL standard "does not raise serious constitutional concerns." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Tr. Coun., 485 U.S. 568, 577 (1988). The decision actually **creates** serious constitutional concerns by forfeiting the judicial role of interpreting the Constitution to a federal agency which had consciously kept its head in the sand. Without an "'affirmative intention of the Congress clearly

expressed'" requiring adoption of an interpretation fraught with unconstitutional implications, courts are, for that reason alone, to reject it as presumptively contrary to Congressional intent. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979). The court of appeals instead presumes, without evidence, Congress intended an interpretation fraught with unconstitutional implications.

CONCLUSION

Public employers must be able to appropriately respond to misconduct by their employes. "The danger to liberty, the danger of mal-administration, has not yet been found to lie so much in the faculty of introducing improper persons into office as in the difficulty of displacing those who are unworthy of public trust." James Madison, 1 Annals of Congress 496 (J.Gales ed. 1789). The court of appeals, without any indicia of legislative intent, presumed Congress intended to drive States towards those dangers and deprive Wisconsin and all other State and local employers of the ability to be accountable to their own citizens. A writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF WISCONSIN,
et al.

Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.

Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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118 pp

Gerald R. MUELLER, James A. Andreshak, and Frederick Moeller, on behalf of themselves and all other employees of the State of Wisconsin similarly situated, et al., Plaintiffs-Appellants,

v.

Robert B. REICH, Secretary of Labor, and United States Department of Labor, Defendants-Appellants,

and

Charles H. THOMPSON, Secretary, Wisconsin Department of Transportation; Wisconsin Department of Transportation; et al., Defendants-Appellees.

Nos. 94-3262, 94-3263.

United States Court of Appeals,
Seventh Circuit.
Argued April 5, 1995.
Decided May 15, 1995.
Rehearing and Suggestion for Rehearing En Banc
Denied July 12, 1995.

Before POSNER, Chief Judge, and CUMMINGS and MANION, Circuit Judges.

POSNER, Chief Judge.

This is a class action on behalf of certain engineers employed by the State of Wisconsin, seeking overtime pay to which the plaintiffs claim to be entitled by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* The Act exempts bona fide executive, administrative, and professional employees, § 213(a)(1); and the state claims, and the district court agreed, that the engineers fall within the exemption. *Mueller v. Thompson*, 858 F.Supp. 885 (W.D.Wis.1994). The class is defined as all state-employed engineers who have been classified as exempt.

The Act does not define the term "executive, administrative, and professional employees," but instead tells the Department of Labor to define it "from time to time by regulations." § 213(a)(1). The Department has done this in a

pair of regulations one of which–the only one we need consider–is known as the "salary basis" regulation. 29 C.F.R. § 541.118. This regulation defines executive, administrative, and professional employees as employees who receive a salary as distinct from an hourly wage–provided (so far as bears on this case) that their pay may not be docked for an absence from work of less than one day and that they are not subject to having less than a week's pay docked for a disciplinary infraction that is not the breach of a major safety regulation. The engineers who make up the plaintiff class are subject to both types of sanction. This may seem to make their case a slam dunk. But in 1992 the Department of Labor created an exception, limited to public employees, to the first proviso and in consequence a public employer may now, without forfeiting its exemption from the Fair Labor Standards Act, dock an employee's pay for missing less than a day's work. 29 C.F.R. § 541.5d. The Department considered whether likewise to make an exception for public employees to the limitation on disciplinary sanctions, but it decided not to. The engineers challenge the new regulation, claiming that the Department is not authorized to treat public employees differently from private ones, but they defend the Department's decision not to go further and differentiate between public and private employers with regard to disciplinary measures. The state, though otherwise pleased with the new regulation, attacks that decision. The district judge rejected the engineers' challenge to the Department but accepted the state's. So the state won the case.

The Department of Labor has managed to inject huge confusion into our appellate review of the district court's decision. The engineers, because they wanted to knock out the new regulation, which had been promulgated by the Department of Labor, named the Department as an additional defendant along with the state. They did not have to do this. The relief they seek is the payment of overtime compensation *by the state*. They ask for nothing from the Department of Labor or any other federal entity. The regulation on which the state relies is an obstacle–that is true. But they could challenge its validity without naming the Department as a defendant. It is utterly commonplace for the validity of

regulations and even statutes to be challenged in private litigation (which from the standpoint of the federal government a suit by private individuals against a state is). See, e.g. *Plaut v. Spendthrift Farm, Inc.*, — U.S. —, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). That is why, for example, a district court is required to certify a challenge to the constitutionality of a state or federal statute to the state or federal attorney general, respectively, and allow him an opportunity to intervene and defend the statute. 28 U.S.C. § 2403; *Max M. v. New Trier High School District No. 203*, 859 F.2d 1297, 1300 (7th Cir.1988). We know of no similar provision requiring a party who is challenging the validity of a federal regulation in private litigation to name the agency that promulgated or enforces the regulation as a defendant.

At all events, the district judge held the regulation valid and also dismissed the suit, so that the engineers obtained no relief of any sort against the Department. Yet the Department filed a cross-appeal. As the Supreme Court has held, *California v. Rooney*, 483 U.S. 307, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987) (per curiam), and we tirelessly remind the bar, e.g., *Grinnell Mutual Reinsurance Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir.1995); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282-83 (7th Cir.1993); *Abbs v. Sullivan*, 963 F.2d 918, 924-25 (7th Cir.1992), and would have expected the agencies of the federal government, at least, to have learned by now, a party is not permitted to appeal or cross- appeal unless it wants the judgment of the lower court modified in some way.

The Department's reason for wanting to cross-appeal is that it is distressed by the district court's ruling that the new regulation, though valid as far as it goes, should have gone even further and exempted public employees from the disciplinary limitation in the salary-based regulation as well as from the prohibition against pay deductions for missing part of a day's work. That ruling is important to the engineers' suit against the state; it doomed the suit. But it did not affect the judgment in the suit against the Department, a judgment of dismissal. A defendant cannot appeal the dismissal of the suit against him on the ground that, in dismissing the suit, the district court said something that may hurt the defendant in a

future case. E.g., *California v. Rooney*, supra, 483 U.S. at 311, 107 S.Ct. at 2854; *Warner/Elektra/Atlantic Corp. v. County of DuPage*, supra, 991 F.2d at 1282-83. That is precisely the ground of the Department's appeal here, as its lawyer acknowledged at the argument. We add that the hurt would be small here because district court decisions are not authoritative as precedents, even at the district court level. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir.1987).

So the cross-appeal was improper, and must be dismissed. What makes it confusing rather than merely superfluous is that the Department, though it manages to avoid saying so, wants the plaintiffs to win their suit against the state. That is, the would-be cross-appellant wants the appellants to win rather than, as is almost always true, to lose. To come within the exemption for executive, administrative, and professional employees, the state must, in the Department's view–and we do not understand any other party to these proceedings to disagree–comply with all parts of the salary-basis regulation (to the extent the regulation is valid, of course), thus including the part limiting discipline; and the state did not comply with that part. But a party cannot appeal from a judgment in its favor merely because it would like the unsuccessful plaintiff to prevail against someone else. *Moy v. Cowen*, 958 F.2d 168 (7th Cir.1992) (per curiam).

The cross-appeal is all the more weird because the Department of Labor is empowered to sue to enforce the Fair Labor Standards Act on behalf of employees aggrieved by violations of the Act and specifically to recover, as their agent, unpaid minimum wages or overtime compensation. 29 U.S.C. § 216(c); see, e.g., *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 293-94, 105 S.Ct. 1953, 1957-58, 85 L.Ed.2d 278 (1985). Indeed, the Act clearly envisions the Department as the primary enforcer. 29 U.S.C. § 217; *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306-07 (7th Cir.1986); *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 745 (7th Cir.1994) (dictum). Since the Department wanted these employees to win, it could have sued on their behalf, and it should have been realigned with them as a plaintiff. This realignment would have made clear that the Department could not file a cross- appeal in this case.

So let us set the cross-appeal to one side and turn to the merits of the engineers' suit against the state.

The state can prevail only if the current regulation, which is to say 29 C.F.R. § 541.118 as amended by 29 C.F.R. § 541.5d, is valid as far as it goes but should have gone further, that is, should have extended the exemption for public employees to the provision on discipline. We think the regulation is valid, period; and therefore that the engineers must win since the state, it is conceded, did not comply fully and had to do so (provided the regulation is valid) to be entitled to the exemption.

When Congress explicitly delegates responsibility for completing a statutory scheme by defining key terms, here terms on which exemption from the statute's requirements turns, without supplying criteria for the exercise of the delegated responsibility, the scope of judicial review is extremely limited. Judicial review of administrative action typically involves comparing the action with the criteria set forth by the legislature to guide the agency. If there are no criteria, about all the court can do is determine whether the agency's action is rationally related to the objectives of the statute containing the delegation. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 647-52, 110 S.Ct. 2668, 2676-79, 110 L.Ed.2d 579 (1990); *Sullivan v. Everhardt*, 494 U.S. 83, 88-89, 110 S.Ct. 960, 963-64, 108 L.Ed.2d 72 (1990); *Madison Gas & Electric Co. v. EPA*, 25 F.3d 526, 529 (7th Cir.1994). That liberal test is easily passed here, at least with respect to the deduction for absences from work of less than a day.

Remember that the issue is entitlement to overtime pay (at the statutory rate of 1.5 times regular pay). There is little purpose in paying overtime if the express or implied contract of employment does not fix specific hours of work, the employee being expected to do as much work (within reason) as necessary to carry out his responsibilities rather than to work exactly the same number of hours day after day. If the employer docks the employee's pay for an absence of a few hours on a particular day, the implication is that the employee

really is expected to work the same number of hours every day, implying in turn that he really is an hourly rather than a salaried worker and that his salaried status is an evasion of the statute. That is the logic behind the original provision governing absences of less than a full day. But when public employees were placed under the Fair Labor Standards Act (effectively in 1985, when the Supreme Court overruled the *National League of Cities* decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)), the Department of Labor discovered that states and municipalities, in accordance with the principle of "public accountability," insist that public employees, even if from a functional standpoint they are executive, administrative, or professional employees rather than hourly-wage employees, must account for every hour away from work, either by using accrued leave or if they have none by losing a pro rata portion of their salary. Americans are suspicious of their civil servants, and do not trust those servants to work as many hours as necessary to do the job. They demand "public accountability"–for every minute, or at least every hour. The interaction between this principle, which is deeply embedded in the American political culture, and the original salary-basis regulation, forbidding pay deductions for absences from work of less than a full day, was to bring under the Act workers who in no realistic sense were hourly-wage employees and were therefore outside the Act's intended scope. Hence the new regulation. We cannot say that it is not rationally related to the objectives of the Act. And we can find nothing in the Act's provision on delegation or elsewhere to suggest that the Department of Labor is forbidden to make rational distinctions between public and private employees.

In drafting the new regulation, the Department considered but rejected making a further exception that would permit public employers to dock their employees less than a full week's pay as a penalty for a violation of work rules or other infraction, even if it is not a major safety infraction–for which so light a penalty would usually be inappropriate anyway. Neither the principle of public accountability, nor any other principle of public administration that has been

drawn to our attention, makes it imperative that public employers have this power with respect to their executive, administrative, and professional employees. What is true is that the bar against this range of penalties reduces the employer's disciplinary flexibility, but this is as true for private as for public employers. So far as we know, there is nothing peculiar to the culture or customs or conditions of public employment that necessitates these penalties. We recognize that a higher percentage of public than of private employees have tenure and that it is difficult (quite apart from the rather silly constitutional bar to firing a tenured public employee without giving him due process of law) to fire a public employee; and this makes alternative sanctions more important. But all the challenged rule prevents is suspensions without pay for less than a week, and it is entirely unclear why that should be thought a crippling blow to effective public administration.

Because the rule barring such suspensions does not impose an insuperable obstacle to states' bringing their executive, administrative, and professional employees within the exemption–all the states have to do is to delete this form of discipline from their arsenals of disciplinary remedies–we do not think there is merit to the district judge's suggestion that to subject the states to the rule violates the constitutional guarantee to each state of a republican form of government. U.S. Const. art. IV, § 4. How the clause relates to the employment of engineers is in any event obscure. Since we do not think the Department of Labor's rule inimical to the guarantee clause, we need not speculate on whether the Supreme Court continues to believe that the clause does not create any legally enforceable rights. Compare *Baker v. Carr*, 369 U.S. 186, 218-26, 82 S.Ct. 691, 710-15, 7 L.Ed.2d 663 (1962), with *New York v. United States*, 505 U.S. 144, — - —, 112 S.Ct. 2408, 2432- 33, 120 L.Ed.2d 120 (1992).

It might be possible to question the rationality of the rule with respect to *all* employees, private as well as public, although we do not understand the state to be attempting so broad a challenge. How, it might be asked, does the structure of discipline affect the character of employees as hourly or salaried workers? The only answer that has been suggested or

that occurs to us is that if an employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis. This is pretty feeble. But apart from the extreme narrowness of the scope of judicial review of the Department's regulation, we do not understand the state to be challenging the disciplinary rule in toto. It is merely challenging the Department's refusal to carve out an exception for public employers. That challenge must fail because the state has not shown what is so special about state employment that makes greater disciplinary flexibility than is permitted to the private sector indispensable to the effective functioning of state government.

The plaintiffs are not exempt from the Fair Labor Standards Act, and the judgment of the district court dismissing their suit must therefore be REVERSED and the case REMANDED to that court for further proceedings in conformity with this opinion. The cross-appeal is DISMISSED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
July 12, 1995

Before
Hon. Richard A. Posner, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge

GERALD R. MUELLER, JAMES A. ANDRESHAK, and FREDERICK MOELLER MOELLER, on behalf of themselves and all other employees of the State of Wisconsin similarly situated, *et al.*, *Plaintiffs-Appellants,*	) Appeals from the United) States District Court) for the Western District) of Wisconsin.)) No. 92 C 891)
Nos. 94-3262, 94-3263 v.	) Barbara B. Crabb,) *Chief Judge*
ROBERT B. REICH, Secretary of Labor, and United States Department of Labor, *Defendants-Appellants,* and CHARLES H. THOMPSON, Secretary, Wisconsin Department of Transportation; Wisconsin Department of Transportation; *et al.*, *Defendants-Appellees.*	))))))))))))

ORDER

On May 30, 1995, defendants-appellees filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

Gerald R. MUELLER, James A. Andreshak, Frederick Moeller, David Tamblyn, David Dahlk, Melvin Sensenbrenner, Richard Nelson, Roger Bohn, David Buschkopf, Curtis Paulson, Thomas M. Stemrich, Terry D. Cook, Gerard Swim, Robert Grosch, and Vernon Carlson, on behalf of themselves and all other employees of the State of Wisconsin similarly situated, and the State Engineering Association,

Plaintiffs,

v.

Charles H. THOMPSON, Secretary, Department of Transportation; Department of Transportation; James R. Klauser, Secretary, Department of Administration; Department of Administration; George Meyer, Secretary, Department of Natural Resources; Department of Natural Resources; Gerald Whitburn, Secretary, Department of Health and Human Services; Department of Health and Human Services; Carol Skornicka, Secretary, Department of Industry, Labor and Human Relations; Department of Industry, Labor and Human Relations; George K. Steil, Sr., President, Boards of Regents of the University of Wisconsin; Board of Regents of the University of Wisconsin; Jon E. Litscher, Secretary, Department of Employment Relations; Department of Employment Relations; State of Wisconsin; Robert Reich, Secretary, United States Department of Labor; United States Department of Labor, Defendants.

No. 92-C-891-C.

United States District Court,
W.D. Wisconsin.

July 22, 1994.

OPINION and ORDER

CRABB, Chief Judge.

This is a class action for declaratory relief and money damages brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 by certain employees of the state of

Wisconsin who are classified as exempt from the overtime pay provisions of the FLSA. Plaintiffs allege that all of the defendants except Robert Reich and the United States Department of Labor (1) classified the individual plaintiffs improperly as "exempt" employees under the FLSA and have not paid them the overtime pay to which they are entitled for all the hours they worked in any week in excess of 40 during the period from December 3, 1989 to date; and (2) knew of the overtime requirements of the Fair Labor Standards Act, 29 U.S.C. § 207, and demonstrated reckless disregard for plaintiffs in failing to pay them overtime wages. Not alleged in the complaint but agreed upon at a conference held pursuant to Fed.R.Civ.P. 16 is plaintiffs' claim that the state defendants have threatened retaliation against plaintiffs for bringing suit on their FLSA claims.

At issue are the state defendants' policies of requiring employees classified as exempt to charge their personal absences to accrued leave and subjecting these employees to disciplinary suspensions of less than one week. Plaintiffs contend that under these policies, they cannot be considered exempt employees because they are subject to reductions in pay in violation of the "salary basis" test that the United States Department of Labor developed fifty years ago for determining when managerial level employees were to be exempted from the requirements of the FLSA. Under these regulations, employees are considered to be salaried and therefore eligible to be treated as exempt executive, administrative or professional employees if, among other things, they receive a set amount of money that does not depend on hours worked or amount of work accomplished and that is not subject to deductions in pay either for personal absences less than a full day in length or for disciplinary penalties of less than one week imposed for infractions of work rules unrelated to major safety concerns. 29 C.F.R. § 541.118. Plaintiffs maintain that the state defendants are required to treat the employees subject to these policies as nonexempt employees entitled to be paid overtime for hours worked in excess of 40 in any workweek.

The salary basis test was promulgated with only private sector employment in mind because at the time the FLSA did not extend to governmental employees. Plaintiffs' suit raises

the question of the extent to which the test applies to the state, local and federal government employees to whom the FLSA has been made applicable in recent years. Plaintiffs contend that the test applies in the same manner to private and public sector employees. They maintain that the federal defendants, Robert Reich and the United States Department of Labor, acted beyond their authority in 1992, when they promulgated 29 C.F.R. § 541.5d, which changes one aspect of the salary basis test as applied to state and local government employees. The new regulation provides that exempt employees in the public sector will not lose their exemptions if their pay is reduced after they exhaust their accrued leave time or take personal leave without permission, provided that the pay system in effect is governed by principles of public accountability permitting employees to accrue leave time and requiring them to use their accrued leave for personal absences. The regulation does not change the prohibition against disciplinary suspensions of less than a week. Plaintiffs contend that the federal defendants acted arbitrarily in creating an exception that allows public employees to be treated differently from private employees for the purpose of applying the salary basis test as it relates to the use of accrued leave time. The state defendants contend that the salary basis test does not apply to state and local governments except as it has been amended in § 541.5d to reflect the demands of public accountability upon state and local governments both because Congress never intended that it would apply and because application of the test to governmental entities would raise serious constitutional questions.

The case is before the court on cross-motions by all parties for summary judgment or for partial summary judgment on the liability issues. I conclude that (1) plaintiffs have failed to show that defendants Reich and the United States Department of Labor acted illegally in promulgating 29 C.F.R. § 541.5d; (2) plaintiffs have failed to show that they lost their exempt status simply because the state defendants required them to use accrued leave time for absences of less than a full day; (3) the salary basis test in § 541.118(a) cannot be applied to state and local government employees except as it has been amended by § 541.5d because it conflicts with congressional

intent; (4) plaintiffs chose to waive their claims of willfulness in return for the state defendants' agreement that they would not contest the application of the three- year statute of limitations; and (5) plaintiffs have failed to show that the state defendants either retaliated against them or threatened to do so for bringing this suit.

For the purpose of deciding these motions, I find there is no genuine dispute with respect to any of the following material facts.

UNDISPUTED FACTS

The Parties

Each of the individual plaintiffs is or was employed by the state of Wisconsin during the relevant time period and has been treated by the state defendants as an exempt employee under the provisions of 29 U.S.C. § 213(a)(3). Except for defendants Robert Reich and United States Department of Labor, defendants are either state agencies or heads of state agencies. Defendant Robert Reich is Secretary of the United States Department of Labor. He and the department administer the Fair Labor Standards Act. On August 19, 1992, these defendants promulgated 29 C.F.R. § 541.5d, which became effective September 18, 1992.

Since at least December 1, 1989, each individual plaintiff has been paid a predetermined amount greater than $1000.00 for each biweekly pay period constituting part or all of that plaintiff's compensation for all work weeks during which that plaintiff performed work and was categorized as exempt under the provisions of the FLSA. In addition, since July 1, 1973, state engineers, such as plaintiffs, have received straight time overtime for work performed in excess of 40 hours a week, as a consequence of a study showing that the state was losing skilled engineers to the higher-paying private sector. Straight time overtime is now incorporated into the collective bargaining agreement between the state and plaintiff State Engineering Association.

The predetermined amount paid to each plaintiff has not been subject to reduction because of variations in either

the quantity or quality of work performed by that plaintiff. However, in every pay period, plaintiffs have been required to charge personal absences of less than a day to compensated leave balances.

Wisconsin Personnel Policies

Under Chapter 504 of the Wisconsin Personnel Manual, the state uses an Official Hourly Rate to calculate the rate of pay of all state employees including the governor and excluding only the nonclassified employees of the University of Wisconsin, regardless whether the employees are salaried and "exempt" or paid on an hourly basis and nonexempt under the FLSA. Use of this rate facilitates accurate record keeping and calculations and promotes administrative convenience and uniformity.

State engineers are eligible for straight time overtime. In order to establish their eligibility for this overtime pay and because many of them are working on projects funded by program revenue or federal money and requiring documentation of time and attendance of employees for auditing purposes, state engineers must keep accurate records of the time they work.

The state has a long-established policy requiring its employees to account for any non-work-related absences from the work place, including those of less than one full day.

As set forth in pages 4 through 6 of Chapter 516 of the Wisconsin Personnel Manual, since at least April 15, 1986, the state has prohibited all state agencies from deducting pay for personal absences from work of less than one day from the salaries of any employee considered exempt under 29 U.S.C. § 213(a)(3).

The Wisconsin Department of Employment Relations employs a compensation analyst to monitor partial-day pay deductions for all FLSA-exempt state employees other than those employed by the University of Wisconsin System. If any employing agency deducts pay from any exempt employee for an absence of less than a full day, the employing agency is sent a standard form letter advising it of the prohibition on pay deductions for absences of less than one day. The University

of Wisconsin-Madison has monitored its employees in the same manner since at least April 15, 1986.

The state of Wisconsin has a policy of imposing uniform discipline upon all employees whether they are represented or unrepresented, management or nonmanagement. As an employer, the state is obliged to establish fair and reasonable work rules for all employees and to establish and administer a fair and reasonable system of discipline for employees who violate work rules, state law or federal law. In determining appropriate discipline in any given case, the state employer must impose discipline that is fair, appropriate to the circumstances, and not excessive. This goal remains the same whatever the employee's status. Differentiating in the application of discipline between represented and unrepresented employees or between exempt and nonexempt employees would risk undermining the validity of the discipline, violating the state's labor relations laws, creating dissension and morale problems among the state's work force and violating the employees' equal protection rights under the state and federal constitutions.

The FLSA status of an individual employee of the state of Wisconsin is not determined solely from the classification of the position held. Exceptions to the usual treatment of employees in a "class title" as exempt or nonexempt are made in appropriate instances and are based on the duties and responsibilities of the individual employee.

Instances of Pay Deductions

Of all state employees who have engineering classifications, with the exception of named plaintiff David A. Russell and class member Terry D. Cook, only three employees have had pay deducted for an absence from work of less than one day since December 1, 1989. (1) Thomas Peronto, Department of Transportation, was listed as having had four hours deducted during the two-week pay period ending August 10, 1991; this apparent deduction was actually a mathematical error in Peronto's leave accounting balance. No actual pay was deducted from his salary. (2) Larry Legro, Department of Health and Social Services, had 5.5 hours

deducted during the pay period ending April 18, 1992; this was an inadvertent error that was corrected in the pay period ending 5/16/92. (3) Karen Lynn Olson was listed as having a payroll deduction for a partial-day absence; the deduction resulted from Olson's request to work at home part-time during an extended maternity leave. In return for the accommodation of her request, she agreed to waive all rights under the Fair Labor Standards Act during this pay period.

On one or more occasions, plaintiff Terry Cook has been disciplined by the department in which he works for using sick leave for absences from work when his supervisors did not believe him to be sick. During the pay period ending December 1, 1990, he was charged with 2.75 hours of leave without pay and during the pay period ending October 19, 1991, he was charged with 21 hours of leave without pay. He has filed a grievance, which is pending. Plaintiff Cook did not work any overtime during the two pay periods for which he received the leave without pay deductions.

During the pay period ending March 21, 1992, class member David Russell received an eight hour leave without pay deduction from his salary. This deduction represented a disciplinary suspension for leaving a training session midway during the presentation and not returning to work. During the pay period ending December 12, 1992, Russell's salary was reduced by 3.5 hours of leave without pay to account for the time in which he was absent from the training session but did not take any form of personal leave. During the two weeks for which Russell received the leave without pay deductions, he did not work any overtime.

Threatened Consequences

For many of the jobs held by plaintiffs, the state has made it a requirement that the persons holding them meet the criteria for entitlement to a professional exemption under the FLSA.

In an affidavit sworn to on December 18, 1992, Judith A. Burke, a classification analyst for the Wisconsin Department of Employment Relations, averred that if a court were to determine that employees serving in the positions of

classifications of civil engineers at issue in this suit were not exempt from the overtime pay provisions of the FLSA, the Department of Employment Relations would be required to review the positions of all state employees currently holding positions in those classifications to determine the appropriate "non-professional" classification series for each position, and to place each position in the appropriate classification, union and bargaining unit.

In a brief filed with this court, counsel for defendants referred to "clear adverse consequences which many potential plaintiffs already perceive and which the named plaintiffs have disparaged or denied...." In various other submissions to the court, both written and oral, counsel for defendants has expressed concern that plaintiffs be made aware of the possible adverse consequences that could follow upon a determination that plaintiffs must be treated as nonexempt under the FLSA. In counsel's view, these consequences could include reclassification and removal from the bargaining unit.

ADDITIONAL FACTS

At a conference held on December 8, 1993, pursuant to Fed.R.Civ.P. 16, plaintiffs stipulated to abandoning their claims that the state defendants had either created job classifications without conducting the inquiry required under the FLSA to determine the status of each individual position or had designed job classifications in ways that discouraged employees from asserting their rights under the FLSA or both. In return, defendants agreed not to contest the application of the three-year statute of limitations. (Ordinarily, plaintiffs must make a specific showing of willfulness on the part of the employer to establish their eligibility for the three-year statute to apply in place of the two-year statute.) 29 U.S.C. § 255(a).

OPINION

A. *Background*

When it enacted the Fair Labor Standards Act in 1938, Congress imposed the requirement that employers pay one and

one-half the regular rate of pay to employees who work more than forty hours in any work week, 29 U.S.C. § 207(a)(1), but exempted from this requirement persons employed in a "bona fide executive, administrative or professional capacity." 29 U.S.C. § 213(a). Congress delegated to the Secretary of the Department of Labor the task of defining "executive, administrative and professional." Id. In 1940, the department promulgated regulations defining an employee in an executive, administrative or professional capacity as one who performs certain duties and has certain specified responsibilities, and "is compensated for his services on a salary or fee basis...." 29 C.F.R. §§ 541.1(f), 541.2(e)(1), 541.3(e)(1). In addition, the regulations required that the exempt employee receive a certain minimum salary, which under the current regulations is at least $155 a week. 29 C.F.R. § 541.17. Employees are considered to be paid on a "salary basis" if they regularly receive a predetermined amount constituting part or all of their compensation, "which amount is not subject to variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). Deductions may be taken from the pay of an exempt employee for personal absences without violating the salary basis test only if the deductions are taken for absences of more than a day. *Id.* Also, deductions may be taken for infractions of work rules if the deductions are for a week or longer or if they are imposed for infractions of major safety rules.

In 1938, when the FLSA was first enacted, it did not apply to employees of state and local governments. In 1966, Congress withdrew the minimum wage and overtime exemptions for employees of public hospitals, schools and certain mass transit carriers. This extension of the FLSA was held to be a constitutional exercise of Congress's commerce clause power. *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968). In 1974, however, when Congress extended FLSA coverage to almost all state and local government employees, the Supreme Court reversed course in part and held the extension unconstitutional to the extent it applied to the "traditional governmental functions of state and local governments." *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). Fewer than

ten years later, the Court overruled National League of Cities in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 533, 105 S.Ct. 1005, 1008, 83 L.Ed.2d 1016 (1985), holding that it was impossible to distinguish "traditional" and "non- traditional" government functions in a principled manner consistent with the principles of federalism. *Garcia*, 469 U.S. at 537-47, 105 S.Ct. at 1010- 15. Abjuring the effectiveness of "judicially created limitations on federal power," the Court held that the protection of state sovereignty interests was properly left to the "procedural safeguards inherent in the structure of the federal system." *Id.* at 552, 105 S.Ct. at 1018.

After *Garcia* was decided in 1985, Congress amended the FLSA to provide a temporary adjustment period for state and local governmental employers. Pub.L. 99-150, 99 Stat. 787 (1985). Recognizing that governmental employers were concerned about the existing salary basis test because they were prohibited by state and local law from paying employees for time not worked, the Wage and Hour Administrator of the Department of Labor announced that the department would adopt a nonenforcement policy with respect to the "salary basis" test as applied to government employees until the department could make appropriate changes. See discussion in 57 Fed.Reg. 37668. However, the administrator stated expressly that the division's nonenforcement policy was not intended to affect the rights of public employees to file private lawsuits. Id. Many such lawsuits were filed, with widely divergent results. *Id.* See, e.g., *Atlanta Professional Firefighters Union, Local 134 v. Atlanta*, 920 F.2d 800 (11th Cir.1991) (salary not subject to deductions and employees do not lose their eligibility for exempt status if no evidence that salary ever reduced in fact; mere possibility of reduction is not a violation of salary basis test); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir.1990) (possibility that salary may be reduced defeats exempt status) (dictum), *cert. denied*, 498 U.S. 1068, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). Finally, on September 6, 1991, acknowledging belatedly the potential liability that "threatened to impair the fiscal integrity of many State and local governmental agencies," id., the Department of Labor promulgated an interim final rule "to provide an exception from certain provisions requiring payment 'on a

salary basis' applicable only to public sector employees." 56 Fed.Reg. 45824. Under this rule, otherwise exempt public employees would not lose their exempt status even if they were paid according to a pay system that required deductions for periods of less than a day when no leave was available. *Id.* at 45826. Plaintiffs contend that this interim rule was not promulgated properly and should not be given any credence. The federal defendants disagree, pointing out that they were not parties to the cases cited by plaintiffs and thus had no opportunity to argue the legality of the interim regulations. As will be seen in the discussion that follows, it is unnecessary to decide the legality of the interim regulations at this time.

On August 19, 1992, the department issued its final rule, which provides that employees of public agencies are not disqualified from exempt status simply because they are paid according to a pay system "established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability," under which the employees accrue leave time and have their pay reduced or are forced to take leave without pay for partial-day absences for personal reasons, illness or injury when (1) they do not use accrued leave because they have not sought permission for use of leave time or have sought permission and been denied it; (2) they have exhausted their leave; or (3) they choose to use leave without pay. 29 C.F.R. § 541.5d. The federal defendants have explained that they proposed § 541.5d because they realized that the existing "regulations were ... out of harmony with the intent of the statute because State and local governments could not avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector." 57 Fed.Reg. 37672.

The promulgation of § 541.5d does not resolve all of the questions raised in attempting to apply the salary basis test to public employees. The regulation deals only with the use and exhaustion of accrued leave time; it does not address the question of disciplinary deductions. (Although a number of commentators had asked for modification of this provision during the comment period provided in connection with § 541.5d, the department deferred taking any action because the provision of the salary basis test concerning disciplinary

deductions, § 541.118(a)(5), was not open for comment at that time. 57 Fed.Reg. 37674.) In addition, there remains the question whether otherwise exempt employees who were required to use accrued leave time between 1985, when Garcia was decided, and 1991, when the interim rule was promulgated, are to be considered exempt or nonexempt during that period. Finally, there is the question raised by plaintiffs in this case whether the promulgation of § 541.5d was within the authority of the department. I begin with this last question.

B. *Validity of 29 C.F.R. § 541.5d*

In contending that the Secretary exceeded his authority in promulgating § 541.5d, plaintiffs are swimming against the tide. When Congress has made an express delegation, as it did here in directing the Secretary to define the terms "executive," "professional" and "administrative" from time to time by regulations, 29 U.S.C. § 213(a)(1), a reviewing court can set aside the resulting regulations only if it finds that the Secretary "exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Batterton v. Francis*, 432 U.S. 416, 426, 97 S.Ct. 2399, 2406, 53 L.Ed.2d 448 (1977) (quoting 5 U.S.C. §§ 706(2)(A), (C)). See also *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (same). Delegation of a specific task almost ensures approval of the result; the courts must accept any reasonable exercise of the delegated discretion. *Reich v. State of New York*, 3 F.3d 581, 587 (2d Cir.1993) (citing *Batterton*, 432 U.S. at 425 n. 9, 97 S.Ct. at 2405 n. 9), *cert. denied*, — U.S. —, 114 S.Ct. 1187, 127 L.Ed.2d 537 (1994).

Plaintiffs maintain that the Secretary acted in contravention of congressional intent when he promulgated two different salary basis tests for public and private employees. Plaintiffs draw the inference that Congress intended no distinction between public and private employees from two sources: Congress's failure to make any such distinction when it first extended the FLSA to public sector

employees and its failure to make any changes in the provisions for determining whether employees qualified as executive, administrative or professional in 1985, when it amended the FLSA to address particular concerns of state and local governments. Plaintiffs argue that these omissions are significant because Congress could have made specific accommodations for state and local governments if it had believed such accommodations were necessary.

Plaintiffs' argument misapplies the principle of statutory construction that the specification of certain things implies that others are intended to be excluded ("expressio unius est exclusio alterius"). The maxim is "notoriously unreliable," *Custis v. United States*, — U.S. —, —, 114 S.Ct. 1732, 1741, 128 L.Ed.2d 517 (1994) (Souter, J., dissenting), because it "rests on the assumption that all omissions in legislative drafting are deliberate, an assumption we know to be false." *Id.* See also *In the Matter of American Reserve Corp.*, 840 F.2d 487, 492 (7th Cir.1988) (omission "may show that Congress has not grappled with the problem"); *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir.1983) ("not every silence is pregnant"). In arguing for the drawing of an inference of Congress's intent not to act from its failure to act, plaintiffs ignore the context in which the legislation was passed. They fail to consider that Congress had delegated to the Secretary the task of defining exempt employees and therefore, had no reason to focus on how that the definition would be interpreted to apply to the public sector. Moreover, plaintiffs ignore the strong evidence that Congress would not have intended that public employees would be treated in the same manner as private employees if the result would be the elimination of exemptions for public employees. Such a result would contravene Congress's stated intention that the exemptions under the FLSA for supervisory employees are available for public sector employees. H.R.Rep. No. 93-913, 93d Cong.2d Sess. 27 (1974), *reprinted* in 1974 U.S.C.C.A.N. 2811, 2837:

> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not now covered by the [FLSA].... The bill will

> provide that virtually all *non-supervisory* government employees will be covered...." By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government.

(Emphasis added). Writing in the Columbia Law Review, Deborah Jones Merritt suggests that Congress's reasons for exempting managerial level employees went beyond mere desire for parity between the public and private sectors to recognition of the limits of federal power under the guarantee clause, Art. IV, sec. 4, to regulate the wages and hours of the persons who possess and exercise the powers of republican government within the states. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Decade*, 88 Colum.L.Rev. 1, 56-57 (1988).

The Secretary has acknowledged that preserving an exemption for supervisors in the public sector would be impossible unless accommodation were made for the needs of local governments to be accountable to the public in their pay practices. 57 Fed.Reg. 37667. Without such an accommodation, the consequence would have been a public employee work force with few exempt employees or none at all and a private sector with its full complement of exempt employees. Such a result would constitute a clear frustration of congressional intent and perhaps, of the Constitution's promise to secure to the states the autonomy to maintain a republican form of government, that is, a government in which the people of the state determine the hours and wages of the state employees who exercise the executive, judicial and legislative functions of state government.

Plaintiffs' arguments suggest a lack of understanding of the purpose of the salary basis test. Essentially, it is a tool for distinguishing between truly salaried, supervisory and professional employees and those who are nonsalaried and nonsupervisory. It is intended to reflect the realities of the work place. The regulatory interpretation of salary basis in existence until 1991 dates back to 1954 and reflects the results of public hearings held in the 1940's and 50's, when

testimony and other evidence were taken from representatives of private industry to determine actual pay practices as they existed in private industry at the time. 57 Fed.Reg. 37666. That evidence indicated that "employees who did not meet the salary test generally also did not meet the other requirements of the exemption." *Id.* at 37672. It was the Secretary's determination in 1954 that the salary basis test was consistent with bona fide employment practices in the private sector; in other words, it was an accurate indication of the way private industry treated its supervisory employees.

It is instructive to note that during World War II, employment policies in the private sector changed as it became common for employers to make disciplinary pay deductions to deter absenteeism. During this period, the Department of Labor changed its regulations to reflect the fact that such deductions were not inconsistent with payment on a salary basis. After the war ended, the practice of disciplinary pay deductions ended and the regulations were revised again to reflect the changed practices. Report and Recommendations on Proposed Revisions of Regulations, Part 541 at 24-25 (Department of Labor, June 1949).

When the FLSA was extended to public sector employees in 1985, it became apparent to the Department of Labor that practices in the private sector could not be carried over to the public sector without amendment, because of "the public accountability principles prevalent in public sector pay systems." 57 Fed.Reg. 37672. Unlike private employees, most public sector employees are subject to requirements that they use accrued leave time when they are absent from work for less than a day. *Id.* To this extent, the salary basis test that reflected the actual working of the private sector in the 1940's and 50's fell short as a guide for the public sector's treatment of its supervisors. The test needed amendment if it was to serve its purpose as a shorthand method of identifying actual administrative, executive and professional level employees in the public sector. In amending the regulations to give a more accurate reflection of the employment practices of governments, the federal defendants acted in accordance with the long-settled practice of the Secretary, which was incorporated in a regulation promulgated on October 20,

1938, that "[i]n determining ... future regulations, separate treatment for different industries and for different classes of employees may be given consideration." 29 C.F.R. § 541.5 (3 Fed.Reg. 2518) (1938); 29 C.F.R. § 541.6 (1993).

The promulgation of § 541.5d was necessary to carry out Congress's intention to make the supervisory exemptions of the FLSA available to state and local governments and to avoid potential constitutional problems. The regulation is a reasonable and necessary response to a difficult problem created by the extension of the FLSA to state and local government employees. The federal defendants are entitled to summary judgment on the claim that § 541.5d is invalid because it distinguishes between private and public sector employees with respect to the use of accrued leave.

C. Accrued Leave Policy Before Enactment of § 541.5d

Plaintiffs have challenged only two aspects of the state defendants' pay policies as violating the salary basis test: the required use of accrued leave time for personal absences and the imposition of disciplinary sanctions of less than a week. They do not attack the state's decision to give plaintiffs straight overtime pay as a means of making their salaries competitive with the private sector and they have abandoned any claim that the duties they actually perform do not meet the duties tests for exempt positions set out in 29 C.F.R. §§ 541.1, 541.2 and 541.3.

It is plaintiffs' contention that even if § 541.5d is valid, the state defendants were in violation of the accrued leave provisions of the salary basis test until § 541.5d was promulgated in September 1992. They concede that the state defendants have not reduced the pay of any of the plaintiffs for taking leave after exhausting their accrued leave time, but they contend that the state defendants have been violating the test by requiring employees classified as exempt to charge personal, partial-day absences to their accrued leave accounts. Citing *Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279 (7th Cir.1993), plaintiffs argue that employees required to account for their personal leave time cannot be considered to be exempt from the FLSA. Plaintiffs are

contending that for the period December 3, 1989 to September 1992, they are entitled to overtime pay for any weeks during this period in which they worked more than 40 hours because they were required to use accrued leave accounts for partial day personal absences during this period.

In *Klein*, the court of appeals held that the "professional" exemption under the FLSA did not apply to a nurse in private employment who was required to use compensatory time for personal absences, while her immediate supervisors were not, and who was subject to disciplinary suspensions for minor infractions. Although Klein's employer had a policy of never reducing pay when an employee used leave time beyond what she had accrued, the court of appeals held that the mere requirement that she use her accrued leave time was a form of deduction in pay. "When Klein was forced to go into negative comp time, she may not have been actually paid less, but she was going into a form of debt...." *Klein*, 990 F.2d at 284. The court of appeals emphasized the fact that Klein's supervisors were not subject to the comp time policy. *Id.*

In relying on this holding, plaintiffs downplay the fact that *Klein* concerned an employee in the private sector. Plaintiffs emphasize that the court of appeals relied for its holding on a number of cases involving governmental employees. They argue that the court of appeals would reach the same holding in this case, but their argument is not persuasive. Most public employers have compensation systems requiring "all employees, regardless of how paid, to use accrued leave time or incur a reduction in pay for any absences." 57 Fed.Reg. 37667. If all or most employees in the public sector must use compensatory time for personal absences, the fact that any one employee is required to do so does not help the fact finder determine whether the employee is viewed (and treated) by the employer as holding a bona fide professional, executive or administrative position. *Id.* at 37670 (certain aspects of the salary basis test "are not valid indicators of the bona fides of a claimed exemption under [29 U.S.C. § 213(a)(1)] in the public sector where every employee may theoretically be subject to potential docking for partial-day absences"). In *Klein*, by contrast, the mandatory use of

compensatory time for personal absences was a means of distinguishing lower level, nonmanagement employees from others, such as Klein's immediate supervisors.

In addition, the court of appeals would likely give weight to the Secretary of Labor's view, expressed in § 541.5d, that the required use of accrued leave time by government workers does not affect the amount of pay such workers receive. The new regulation casts doubt on the holdings relied on by the court of appeals in *Klein*, 990 F.2d at 284, to the effect that reduction of leave time is the equivalent of a reduction in pay even though pay is not actually reduced. See *Abshire v. Kern*, 908 F.2d at 487 n. 3; *Benzler v. Nevada*, 804 F.Supp. 1303, 1306 (D.Nev.1992); *Aaron v. Wichita*, 797 F.Supp. 898, 907 (D.Kan.1992); *Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F.Supp. 1503, 1510 (S.D.Cal.1992).

It is noteworthy that the Court of Appeals for the Ninth Circuit has disavowed its dictum in *Abshire*, 908 F.2d at 487 n. 3. Many courts had relied on this dictum, which suggested that an express policy of deducting from public employees' accrued paid leave for absences of less than one day might violate the salary basis test, even if such deductions were never made. These courts had held that such deductions do violate exemption. *See, e.g., Fleming v. Carpenters/Contractors Cooperation Comm.*, 834 F.Supp. 323 (S.D.Cal.1993) (requiring employees to use accrued leave for partial-day absences violates salary basis test). *See also Benzler*, 804 F.Supp. 1303; Aaron, 797 F.Supp. 898; *Service Employees*, 784 F.Supp. 1503. In a recent opinion, *Barner v. City of Novato*, 17 F.3d 1256 (9th Cir.1994), the court of appeals affirmed the district court's holding that "deductions from the paid leave banks of the Plaintiffs for absences of less than one day did not constitute impermissible deductions from 'salary' as defined in 29 C.F.R. 541.118." *Id.* at 1261. Basing its decision on the holding that the words "amount" and "compensation" in the salary basis test set out in 29 C.F.R. § 541.118(a) refer to "cash" or "salary," the court held that a reduction in paid leave time does not affect the amount of an employee's compensation paid to him regularly; therefore, requiring a public employee to use accrued leave for personal

absences does not affect his status as a salaried employee. In reaching this conclusion, the court noted expressly that it was rejecting the holdings of *Benzler*, *Fleming*, and *Service Employees*. Given this disavowal of the *Abshire* dictum, it is unlikely that in a case involving public employees the Court of Appeals for the Seventh Circuit would reach the same conclusion it reached in *Klein* that the required use of accrued leave is equivalent to a deduction in pay.

Again citing *Klein*, 990 F.2d 279, plaintiffs raise a second contention: that because they were always "subject to" an actual reduction in pay if they exhausted their "accrued leave," they never met the requirements for exempt employees. Addressing disciplinary suspensions for minor infractions, a different issue, the court of appeals held in *Klein* that such a suspension and resulting reduction in pay need not actually have occurred before the practice could be said to violate the statute: "it is enough that the deduction could have been made for an impermissible reason." *Id.* at 286.

A number of courts have held in government employee cases that the mere possibility that salary might have been reduced for partial day absences did not make the salary "subject to" such reductions if the reductions were never taken. *See, e.g., McDonnell v. City of Omaha*, 999 F.2d 293, 297 (8th Cir.1993) (declining to read "subject to" language of regulation as meaning that possible or contingent reduction in salary automatically means pay is "subject to reduction"); *York v. City of Wichita Falls*, 944 F.2d 236 (5th Cir.1991) (executive status not necessarily defeated by subjecting pay to reductions if reductions never actually taken); *Atlanta Professional Firefighters Union*, 920 F.2d at 805 (salary not subject to deduction if deduction never taken); *Harris v. District of Columbia*, 709 F.Supp. 238, 241-42 (D.D.C.1989) (same). *See also Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections*, 992 F.2d 82 (6th Cir.1993) (although leave policy could be read as requiring docking of pay when accrued leave exhausted, policy language was ambiguous; fact that no employee had ever been docked pay under this policy persuades court that employees were not "subject to" reduction in pay before September 1, 1991, when Secretary promulgated interim salary basis test).

In this case there is no ambiguity about the policy and not even a possibility that reductions would be made. The clear language of the state regulations prohibited reductions and state employees monitored payrolls to ensure that none were ever made. I conclude that even before 1991, the salary basis test in § 541.118 was not violated by the state defendants' policy requiring employees to charge partial-day absences to accrued leave accounts. Moreover, even if the state defendants' policies did not fulfill the requirements of the salary basis test, I would not hold that the state defendants had forfeited their right to claim an exemption for plaintiffs. As the Department of Labor explained in promulgating § 541.5d, Congress never intended to require state and local governments to chose between their obligation to remain accountable to the public and their ability to make use of the FLSA's managerial exemption. Therefore, the regulation would be invalid as applied to the public sector because it contravenes congressional intent. *Chevron U.S.A.*, 467 U.S. at 843 and n. 9, 104 S.Ct. at 2781-82 and n. 9 (as final authority on issues of statutory construction, judiciary "must reject administrative constructions which are contrary to clear congressional intent").

D. *Application of 29 C.F.R. 541.118(a)(5) to State and Local Governments*

The salary basis test, § 541.118, requires that an exempt employee "must receive his full salary for any week in which he performs any work," subject to a few exceptions. Among these are § 541.5d, discussed above, and the provision in subsection (5) of § 541.118 that penalties imposed in good faith for infractions of safety rules of major significance may be deducted from the salaries of exempt employees without affecting their exempt status. Although subsection (5) does not say explicitly that exempt status will be lost if deductions are taken for other infractions, the only logical reading of the subsection is that the salary basis test is violated by the imposition of a penalty suspension without pay of less than a week, unless the penalty is imposed for the violation of a major safety rule. *See Klein*, 990 F.2d at 285 (citing Wage &

Hour op. letter No. 90-42NR (Mar. 29, 1991)) (only disciplinary type of deduction permissible is one imposed as penalty for violations of major safety rules).

Class member Russell received a deduction from his pay as a penalty for an infraction not involving a safety rule. Plaintiff Cook may receive such a deduction, depending on the outcome of his grievance proceeding. Plaintiffs contend that the imposition of such a penalty on Russell is evidence that the state defendants have been treating all the plaintiffs as nonexempt employees for the three years preceding the filing of this suit and for all the time since then. They argue that the disciplinary suspension imposed on Russell shows that it was always possible that an otherwise exempt employee would receive a disciplinary suspension of less than a week.

The state defendants do not argue that Russell's suspension was inadvertent or that the disciplinary policy is no longer operative. To the contrary, they argue forcefully that they have an obligation to continue to impose such discipline when it is warranted if they are to remain accountable to the public. They cite the constraints of the equal protection clause as well, which they say requires them to treat exempt and nonexempt employees alike in imposing disciplinary suspensions.

If this case arose in a private employment context, the holding in *Klein*, 990 F.2d 279, would dictate the conclusion that employees "subject to" the same kind of discipline Russell received cannot be considered to be exempt under the FLSA. The court's holding is explicit: when employees are subject to reductions in pay because of partial-week suspensions that are related to the quality or quantity of their work, they do not meet the salary basis test set out in § 541.118(a). It is not necessary that they actually have had deductions made in their salary; "it is enough if the deduction could have been made for an impermissible reason." *Id.* at 286.

Klein forecloses most of the arguments that the state defendants might make to support their position that the possibility of disciplinary suspensions should not endanger an employee's exempt status. Chief among these is that the regulation should not be applied mechanically without considering the purpose of the salary basis test. *Klein*, 990

F.2d at 285. Klein's employer argued that "disciplinary deductions which are actually salary deductions are prohibited by the safety rules section while legitimate unpaid suspensions not meant as impermissible salary deductions should not be proscribed by the section." *Id.* Another way of saying this is that the salary basis test is designed to prevent an employer from treating its employees as hourly workers while classifying them as exempt. If the employees have their pay docked for being late to work, or not being at their desks from nine to noon, or not finishing a specified amount of work, then the penalties are being used in a manner inconsistent with exempt status. On the other hand, the argument goes, if the penalties are imposed only for such serious work rule violations as lying about work-related matters, forging documents, or sexually harassing a co-worker, they are imposed for reasons that have nothing to do with whether the employee should be classified as exempt or nonexempt. The court of appeals rejected this argument in *Klein*, although it is not clear whether it did so on the merits or simply because it thought the argument inapplicable to *Klein*. The court said only that "the fact remains that Klein's salary was impermissibly reduced on occasion because of her suspensions which resulted from the quality or quantity of her work." *Id.* (Presumably the court believed that Klein's suspensions for rudeness, failure to help a patient and "performance problems" related to the quality of her work.)

It is possible that the court of appeals would find *Klein* inapplicable to disciplinary penalties imposed in connection with unauthorized absences for the reason relied on by the Court of Appeals for the Fourth Circuit in *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir.1993). In *Shockley*, the court held that 29 C.F.R. § 541.118 is not violated by imposing a partial-week deduction in pay as a penalty for a failure to report an absence, because such a deduction is inherent in the power to reduce pay for the partial-day reductions in pay now recognized as allowable under 29

C.F.R. § 541.5d. The holding is not entirely persuasive.[1] Section 541.5d addresses deductions in pay for certain partial-day absences, including unapproved absences. It is not clear that the regulation authorizes a deduction in pay imposed as a disciplinary sanction for taking unapproved leave or that it is intended to modify the language in § 541.118(a)(5) limiting permitted disciplinary deductions to those imposed for violations of major safety rules.

The conclusion seems inescapable that if the disciplinary deduction aspect of the salary basis test applies to government employees, there is no principled way in which to avoid its application to plaintiffs under Klein. I am persuaded, however, that just as the department has recognized through the promulgation of § 541.5d that Congress never intended that public employees would be covered by the prohibition on reductions in pay for partial-day absences, Congress never intended that state and local governments would be bound by the prohibition on disciplinary deductions of less than a week contained in 541.118(a)(5). Although the federal defendants maintain that there is a distinction between reductions for partial-day absences and disciplinary suspensions, they have provided no credible explanation for this position and it seems dubious in light of their arguments regarding the validity of § 541.5d.

As the Department of Labor explained when it promulgated § 541.5d, principles of public accountability would have made it impossible for many state and local governments to meet the salary basis test for managerial

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[1]The holding seems to reflect a growing recognition of the problems caused by attempting to apply to governmental employment the salary basis test developed for the private sector and an attempt to deal with those problems. *See also Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir.1994) (holding that disciplinary suspension of two police lieutenants for non-safety-related infraction resulted in loss of exempt status for all lieutenants; adding that court would resist the temptation to conclude that § 541.118(a)(5) is arbitrary and capricious as applied to law enforcement employees, "because the City did not raise that issue in the district court and has not suggested it in this court").

employees if the test were not modified to permit the use of accrued leave systems that had been in place for decades. 57 Fed.Reg. 37667-76. The department recognized that requiring state and local governments to change their pay policies to conform to the § 541.118 salary basis test would conflict with the principles of public accountability to which many state and local governments are subject. 57 Fed.Reg. 37673. The department has acknowledged that the public "does not tolerate wasteful and abusive excesses such as padded payrolls or 'phantom' employees," *id.* at 37676, and that it was necessary to modify the salary basis test to accommodate these concerns in order to carry out Congress's intent that public employment would have the same professional, executive and administrative exemptions that private employment has always had.

Although promulgation of § 541.5d conformed the Department of Labor's regulations to congressional intent with respect to use of accrued leave, it did not resolve the question of the validity of applying to public employees the portions of § 541.118 that were not altered by the promulgation of § 541.5d. As I noted previously, had it been necessary to decide whether reductions in pay for partial-day absences violated the salary basis test prior to 1992, I would have held that the application of the pre-1991 regulation to the public sector did not accord with congressional intent and was invalid as applied to governmental employees. *See Chevron*, 467 U.S. at 843 and n. 9, 104 S.Ct. at 2781-82 and n. 9; *Stewart v. City and County of San Francisco*, 834 F.Supp. 1233, 1238 (N.D.Cal.1993) (if salary basis regulations in effect before 1991 were contrary to intent of Congress, regulations cannot be applied to public employees). *See also Martinez v. Rhode Island Housing and Mortgage Finance Corp.*, 738 F.2d 21, 26 (1st Cir.1984) (citing *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)) ("a rule out of harmony with the statute is a mere nullity").

Returning to § 541.118(a)(5), which prohibits the use of partial-week disciplinary suspensions except for violations of major safety rules, I find this provision invalid as applied to the public sector because it does not comport with

congressional intent to afford public sector employers the same opportunities for FLSA exemptions as private employers. The situation is more egregious than with partial-day absences, because the Department of Labor has not yet considered in any formal way the effects of § 541.118(a)(5) on state and local governments' ability to claim the FLSA exemption. Rather, subsection (5) of § 541.118(a) remains in force. It purports to tell state and local governments how they may discipline their employees and for what infractions, placing them in a quandary similar to the one they faced when they believed the choice was between dismantling accrued leave systems and forgoing all exemptions under the FLSA. Either the states give up their ability to discipline their employees in the way they believe best suited to maintaining public accountability or they forgo all exemptions under the FLSA.[2]

It is no answer to say, as the federal defendants do, that the impairment of the states' disciplinary authority is minor because government employers have other options for disciplining exempt employees, such as letters of reprimand, demotions, transfer to less favored positions or suspensions of more than a week. For many reasons, state and local governments lack the kind of disciplinary flexibility the federal defendants hypothesize. The inadequacy of the federal defendants' response is amplified by the fact that when the issue of disciplinary suspensions was raised during the notice and comment period for § 541.5d the department offered the same response it urges in this case, that is, that the disciplinary prohibition is no real burden on state and local governments in part because they have other disciplinary options, but then

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[2]Wholly apart from concerns of state autonomy, the salary basis test creates another Hobson's choice for state and local governments. These governments are required to keep precise records of all the time their employees work on federally-funded state projects and they are subjected to potential penalties if they fail to do so. At the same time the federal government seems to disallow these governments from claiming exempt status for professional employees if the employees are required to keep time records and are subject to discipline for not working or for falsifying their time records.

noted that § 541.118(5) was not open for comment during the present rulemaking. However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date. 57 Fed.Reg. 37674. The Department of Labor cannot contend with any consistency that the application of § 541.118's prohibition on disciplinary sanctions vindicates congressional intent. The department has failed to give any formal consideration to this issue and has recognized the need for such consideration in the future, while arguing that promulgation of § 541.5d was necessary because § 541.118 was "out of harmony" with congressional intent. 57 Fed.Reg. 37672. It is not credible for the Department of Labor to acknowledge that the regulation needs substantial revision in order to comply with Congress's wishes, and then to assert without investigation that the application of another subsection of the regulation conforms with congressional intent. When an agency offers inconsistent interpretations of a statute, that agency's interpretations are not entitled to deference. *Batanic v. I.N.S*, 12 F.3d 662, 666 (7th Cir.1993).

Because the Department of Labor has neither considered the issue of disciplinary sanctions nor offered any persuasive reason for its apparent belief that the ability to impose disciplinary sanctions is less central to state and local governments' public accountability obligations than the ability to impose reductions for partial-day absences, the application of § 541.118(a)(5) to the public sector is arbitrary and capricious. I conclude that § 541.118(a)(5) is invalid as applied to the public sector.

Construing § 541.118(a)(5) to be invalid as applied to the public sector vindicates two corollary principles of statutory construction that " 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,' " *Rust v. Sullivan*, 500 U.S. 173, 190, 111 S.Ct. 1759, 1771, 114 L.Ed.2d 233 (1991) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) and adding emphasis) and " 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt on that score.' " *Rust*, 500 U.S. at 191, 111 S.Ct. at 1771

(quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 659, 60 L.Ed. 1061 (1916)). *See also Batanic*, 12 F.3d at 666. The state defendants contend persuasively that interfering with the states' ability to decide how to discipline employees who violate rules promoting public accountability would raise a serious constitutional issue.

The state defendants argue that if the FLSA is read as reflecting Congress's intent to apply the disciplinary suspension aspect of the salary basis test to state and local governments, to that extent, the statute is an unconstitutional violation of the guarantee clause because it undermines the public accountability of state governments, the bedrock upon which the states ground their governing authority. The clause provides in pertinent part: "The United States shall guarantee to every State in this Union a Republican Form of Government...." Many courts have held the clause nonjusticiable. *See, e.g., Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir.) (rejecting a challenge to Wisconsin's partial-veto scheme as violative of the guarantee clause), *cert. denied*, — U.S. —, 112 S.Ct. 180, 116 L.Ed.2d 142 (1991). However, in two recent cases the Supreme Court has suggested that this long-held view of the nonjusticiability of the clause may be overstated, particularly when the claim under the clause does not present a political question (as was the case in *Risser*). *New York v. United States*, — U.S. —, —, 112 S.Ct. 2408, 2433, 120 L.Ed.2d 120 (1992) (citing among others, Merritt, 88 Colum.L.Rev. 70-78); *Gregory v. Ashcroft*, 501 U.S. 452, 462-63, 111 S.Ct. 2395, 2402, 115 L.Ed.2d 410 (1991). Prof. Merritt's thoughtful discussion of the guarantee clause supports the argument advanced by the state defendants that the clause is not the dead letter it is often assumed to be; rather, it supplies the substantive content the Tenth Amendment lacks by setting out in affirmative language the federal government's promise "to secure each of the states the autonomy necessary to maintain a republican form of government" and by providing "an essential constitutional limit on federal interference with state autonomy." 88 Colum.L.Rev. at 22-23. "The guarantee clause, therefore, promises each state a government based on popular control." *Id.* at 25. The state defendants' guarantee clause argument presents a genuine

constitutional question. It is not an argument foreclosed by the decision in *Garcia*, 469 U.S. 528, 105 S.Ct. 1005, because it was never raised in that case.

In *Rust*, 500 U.S. at 191, 111 S.Ct. at 1771, the Supreme Court recognized that it is legitimate not to reach constitutional questions that can be avoided through choices in statutory construction. The Court recognizes another principle of statutory construction that avoids unnecessary adjudication of the Tenth Amendment and guarantee clause issues: when congressional action upsets the usual constitutional balance of state and federal powers, " 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' " this balance. *Gregory v. Ashcroft*, 501 U.S. at 460, 111 S.Ct. at 2401 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985)). Because *Garcia* "left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, [the courts] must be absolutely certain that Congress intended such an exercise." *Id.* at 464, 111 S.Ct. at 2403. The state defendants maintain and the federal defendants agree that when Congress extended the FLSA to public employees, it was thinking primarily in terms of minimum wage requirements and never considered the effect a regulation such as the salary basis test would have on the already complex pay and leave systems of public employment. When it is clear, as the federal defendants concede, that Congress had no intention of requiring state and local governments to choose between the managerial exemption and their public accountability principles, it becomes inappropriate to interpret the FLSA to require application of the disciplinary provisions of the salary basis test. Doing so would be a distinct expansion of an already significant intrusion into state sovereignty, *Garcia*, 469 U.S. at 557-79, 105 S.Ct. at 1021-32 (Powell, J., dissenting) and at 580-89, 105 S.Ct. at 1033-37 (O'Connor, J., dissenting). Moreover, it is an unnecessary expansion.

Nothing in the salary basis test is essential to an effective extension of the FLSA to government workers. Indeed, the United States Office of Personnel Management

does not use either salary or the salary basis test to determine executive, administrative and professional exemptions under the FLSA for any federal employees other than congressional employees, employees of the United States Postal System, the Tennessee Valley Authority, the Postal Rate Commission and the Library of Congress. Instead, it makes the determination according to grade level and position classification. 57 Fed.Reg. 37667. It is important to keep in mind that the salary basis test is only a tool for implementing the FLSA, not a part of the substantive law of the FLSA itself. This fact makes it all the more unlikely that when Congress extended the FLSA in 1974, it did so with the intent to apply the existing salary basis test to state and local governmental workers. In the absence of any clear statement by Congress that it intended the salary basis test to be applied to state and local governments as part of the expansion of FLSA in 1974 or 1985, *Ashcroft* requires that such a choice not be assumed and that regulations requiring the application of such tests be invalidated.

E. *Retaliation by State Defendants*

Pinning down plaintiffs' theory of retaliation is not easy. Plaintiffs make a number of allegations in their briefs, ranging from references to statements made in private discussions by persons not party to this lawsuit to a theory that defendants

> retaliated against the Plaintiffs in violation of Section 215(A)(3) of the FLSA by creating a system of position classifications which establish exempt FLSA status as a precondition to qualifying for and retaining particular civil service classifications and, thereafter, using this system as a basis for threatening Plaintiffs with negative consequences in the form of downward reclassification if they prevail in this action.

Plaintiffs' reply brief, dkt. # 202, at 3. Despite numerous allegations in their briefs, plaintiffs proposed as facts only the substance of Judith Burke's affidavit and certain statements made by defendants' counsel during the course of this

litigation. Therefore, I will confine this discussion to the theory that is supported by factual proposals: that the affidavit and defendants' counsel's comments constituted an actionable threat of retaliation against plaintiffs for commencing this lawsuit.

Plaintiffs' theory does not withstand close scrutiny. A review of the Burke affidavit and the statements of defendants' counsel reveals that they are nothing more than a straightforward explanation of their authors' views of the adverse consequences that plaintiffs might suffer if they succeeded in proving to the court that they were misclassified for their present positions. At the time the statements were made, the operative complaint in this case contained plaintiffs' allegations that their job duties did not meet the prerequisites for exemption from the FLSA. Had plaintiffs continued to pursue this theory, they might have proven that at least some of them were performing jobs with duties that did not justify an exemption from the FLSA. Had this happened, it would have been necessary to re-evaluate the job classifications. Whenever a re-evaluation of a job is undertaken, the possibility exists that the job will have to be downgraded or its classification changed. Telling prospective plaintiffs about this possibility is hardly a threat; it is a statement of reality.

In her affidavit, Judith Burke explained that some jobs presently held by plaintiffs make exempt status a precondition to retaining a particular civil service classification and that if plaintiffs were to lose their exempt status as a result of this lawsuit, they might not be eligible to retain their jobs. In response to this affidavit, plaintiffs assert that when defendants set up these jobs and made exempt status a condition, they were implementing a scheme to provide for downward classification in the event employees were to vindicate their rights under the FLSA. In reminding plaintiffs of this possibility, plaintiffs assert, defendants were retaliating against plaintiffs for the filing of this lawsuit. Interesting though this particular challenge might be, plaintiffs waived their right to pursue it in return for defendants' agreement not to challenge the application of a three-year period of recovery.

In short, I can find no merit in plaintiffs' theory of retaliation. Defendants are entitled to summary judgment on this claim.

F. *Employees Legro, Peronto and Olson*

It is undisputed that the reductions in pay for Larry Legro and Thomas Peronto were either inadvertent or not true reductions. The treatment of these two employees was not part of a pattern of inadmissible reduction and it did not convert them to nonexempt employees.

As to Karen Olson, defendants concede they may have erred in conditioning her ability to work at home on her waiver of her rights under the FLSA. If so, that is a separate violation independent of the claims raised in this lawsuit. Olson's treatment does not implicate any rights of the other plaintiffs or support any of the issues in dispute in this suit.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Robert Reich and the United States Department of Labor is GRANTED; the plaintiffs' motion for partial summary judgment on liability is DENIED; and the state defendants' motion for summary judgment is GRANTED in all respects. The clerk of court is directed to enter judgment for defendants and close this case.

LIST OF PLAINTIFFS WHO CONSENTED TO JOIN ACTION

Mustafa Abdulghani, Khader Abual-Eis, Duane J. Acker, Christopher L. Adams, Steven Adamsky, Michael E. Adler, Thomas L. Ahrens, Abdulhamid M. Ali, Anthony P. Allard, Paul J. Ambrose, Robert James Anderson, Ron Anderson, David F. Andre, James A. Andreshak, Robert Arndorfer, Michael Dean Ash, Ricky L. Auseth, David L. Babler, Roy W. Bantley, David J. Barger, Rebecca A. Barile, George T. Barry, Larry J. Barta, David E. Barth, Kim Bartley, Henry J. Bassa, Donald A. Bay, Robert N. Beaudette, Duane E. Beckwith, Albert R. Belling, Robert L. Bennett, William J. Bennetts, James Joseph Benning, James E. Berg Jr., Donald W. Bergman, Candace B. Bettinger, John R. Bierman, James Billmeyer, Larry Dale Bisonette, Allan Bjorklund, Kenneth O. Bjorklund, Christian G. Blazek, Brian Bliesner, Michael A. Blodgett, Beth Blum, Jaime S. Boado, Robert J. Bocher, Roger A. Bohn, Leon B. Boland, John S. Bolka, Gary Bolstad, Lauren Bomkamp, Robert A. Braun, Paul A. Brehm, Roger N. Breitzmann, Sharon L. Bremser, Thomas Brennan, Brian S. Brock, Leonard C. Brody, Michelle Brokaw, Deborah A. Brucaya, Jerome G. Bruckert, Howard H. Brunmeier, Michael W. Bub, Paul G. Buckner, John H. Buran, Joseph W. Burggraf Jr., George F. Busch, James P. Buschkopf, David Buschkopf, Douglas A. Cain, Paul J. Caleb, Ronald L. Calkins, Vernon M. Carlson, William C. Carpenter, Paul A. Carr, David C. Castleberg, John W. Chapman, Robert J. Christie, Gary L. Colbert, Thomas J. Cole, Raymond T. Collins, John M. Collins, Terry D. Cook, John Martin Corbin, William J. Cronkrite, Albert P. Crowe, Eugene O. Dahl, Donald A. Dahle, David E. Dahlk, Stanley W. Dallman, Amy R. Damrow, William Dandeneau, Kenneth R. Dann, Charles R. Davenport, Kimberly S. DeCora, Darwin Derge, Thomas A. DeWinter, Francis J. Dierking, Brendan D. Dirkes, Andrew J. Dirks, Gaylord N. Dolphin, Norman Dombrowski, Francisco Rivera Dominguez, Dean F. Dopkins, Robert S. Downing, Gerald L. Drain, Kathleen J. Drews, LeRoy M. Dumonson, Alan Eckes, Ronald Egge, Norbert Elliott, Wafa A. Elqaq, Peter F. Engh, Bradley K. Erikson, Benedict Eruchalu, Richard D. Feeney, Peter K. Feneht, David L. Field, John W. Fincher, David Fischer, Philip E. Fish, John W. Fitzgerald,

Edward A. Fitzgerald, Patrick Fleming, Joseph L. Flottmeyer, Russell L. Frank, Richard O. Fries, Larry Funseth, Gregory F. Furlano, Gary A. Galliford, Ronald A. Garvens, Tom R. Gerstmann, Charles H. Geurts, James E. Gibeau, Janice M. Gibeau, Donald R. Gilbertson, Allen R. Gilbertson, Paul A. Gingras, Russell G. Glime, James F. Gloodt, Duane J. Golliher, Ronald J. Giuli, Robert Gose, Dalton G. Goss, C. Joseph Graf, Donald R. Grasser, Richard A. Grimsrud, Robert P. Grosch, Roberto Gutierrez, Don Haack, Russell Habeck, James A. Haefner, Robert Hanifl, Gustave E. Hanold, Alan G. Hansen, Ronald Harder, Robert A. Hardie, Thomas J. Hardinger, Colleen M. Harris, James C. Harris Jr., Wayne Hartling, Donald G. Hartman, Mohomad Hayek, Donald W. Heglund, Fergus N. Heintz, Lisa J. Herrmann, Thomas Heydel, Harland L. Higley, Darwin C. Hoefs, Walter J. Hoffman, Clifford R. Hoiby, Daniel A. Holloway, Clifford R. Hotchkiss, Elton R. Hubbard, Robert D. Hubing, Albert G. Hutter, Richard A. Huxford, Scott M. Ives, Thomas J. Jablonski, Dan Jashinsky, Stephanie R. Jaworski, Steven M. Jeidy, Norman A. Jensen, Judith A. Johnson, Ross T. Johnson, Bertil C. Johnson, Dewayne J. Johnson, Duane L. Johnson, Allan Johnson, Myles P. Johnson, Robert L. Johnson, Susan E. Johnson, Donald R. Johnston, Kerry C. Jones, Paul L. Jones, Robert J. Jones, Quentin L. Martin Jr., Jeffrey A. Kaarto, John A. Kaarto, Ronald P. Kapitanski, Charles A. Karow, James H. Kasdorf, Daniel H. Katzner, John G. Keiffer, Wilbert E. Kell, Todd Patrick Kennedy, Barbara J. Kerber, Thomas J. Kerr, David D. Kircher, Donald W. Kiefert, Allan J. Kimber, Keith J. King, Orville D. King, Mark A. Klipstein, Ralph C. Kloes, Kenneth D. Kluever, John J. Knapp, Ellsworth R. Koehnke, Lewis E. Kohn, James R. Koltz, Gary K. Krafcheck, Bernard E. Kranz, David T. Kringle, James R. Kropp, William P. Ksicinski, Robert T. Kubczak, Linus J. Kujak, David A. Lamont, Charles N. Landey, Glenn R. Landis, Merrill W. Landis, Robert O. Lang, Susan Langdon, Michael J. Larson, Lynda J. Lawler, Scott J. Lawry, Gilbert Layton, Larry J. Legro, Norbert A. Lehmann, Michael R. Leitzke, Michael Lenz, James A. Lepinski, William W. Leren, Carl G. Lesky, Paul H. Leu, Philip J. Liepitz, Randolp A. Lokken, Andrea T. Lobacz, Gary L. Lovelace, Dennis D. Loy, John E. Lucey, Ryan P. Luck, Randy W. Luedtke, Harold F.

Lutz, Kenneth C. Lyman, John Lynch, Dennis Lyngen, Timothy J. Maedke, Michael Malaney, Dale E. Marg, James R. Martin, John L. Martin, Arvid R. Martin, Richard A. Marz, Donald J. Matula, Andrew J. Maxwell, David C. Mayer, Merle T. McAuley, Timothy A. McCarthy, David D. McCosh, Joseph L. McKee, William R. McNary, Frederick S. Moeller, Ralph L. Meir, Jerald M. Mentzel, Robert S. Merila, James C. Merriman, Keith H. Meyer, Dale R. Merten, Jeffrey R. Michalski, Thomas E. Milchesky, Julie J. Millard, Robert W. Millard, Thomas H. Miller, Jack A. Miller, Larry G. Miller, William T. Miller, John Minor, Mark A. Mohlman, Sharam Mokhtari, Jon P. Molzahn, Matthew J. Morrell, Mark Morrison, Mohamed A. Mounir, Robert T. Mucha, Gerald R. Mueller, Patrick Muldoon, Michael D. Muller, Matthew D. Murphy, George T. Nelson, Richard P. Nelson, Randall S. Nevala, William R. Niemi, Clair J. Norris, Steven L. Nouzak, Vida Novakovich, Patrick F. O'Connor, Cindy M. O'Connor, William J. O'Mara Jr., Jay R. Obenberger, Jon Obenberger, John E. Oimoen, Daniel J. Ojibway, Sylvester F. Okon, Daniel Okpala, Olubunmi Olapo, Dale Oldenburg, Norbert Oleinik, Richard G. Olson, Karen L. Olson, Joseph S. Olson, LeRoy M. Olson, Gerald E. Olson, Charles Orville, Claudia Orvis, George Osipoff, Donald R. Ostreng, Ronald L. Ostreng, George E. Ott, David E. Owen, Saundra Parker, Raymond G. Parks, Dennis Parsley, Walter E. Parsons Jr., Biren A. Patel, Robert G. Pavlik, Ronald A. Paulson, Curtis R. Paulson, Sandra A. Pease, Roland E. Pentico, Daniel A. Penzkover, Michael J. Perkins, Thomas M. Peronto, Todd R. Peschke, Jeffrey A. Peters, Jean M. Peters, Lorie R. Peterson, James D. Peterson, Richard H. Pfeiffer, Timothy Patrick Phillips, Stacey L. Pierce, Donald D. Pike, James W. Pikulik, David P. Pilon, Jeffrey J. Plesko, John R. Pope, Robert L. Pozorski, Edward J. Prissel, Richard A. Prissel, Frank J. Pritzlaff, Arlyn L. Proksch, William H. Prue, Peter J. Prusak, Mike Rathsack, Katherine J. Redell, John L. Reed, Gene L. Reiter, Gene W. Renguette, Anne L. Reshadi-Nezhad, Brian V. Revello, James B. Rice, Harvey L. Rieder, James L. Riedl, Charles E. Riley, Edward M. Riley, Leland J. Ringblom, Donald M. Ritland, Richard O. Roberts, Michael Roberts, Roderick B. Robillard, Joseph W. Rocki, Doreen A. Rogers, James D. Rohe, Robert E. Roszkowski, David Russell, Glenn D. Saeger, Donald

E. Saeger, Lynn Saeger, Terry A. Salzman, Gary Sassman, James P. Savoldelli, Susan Saxe, John G. Schaefer, Garry W. Schaeffer, Albert L. Schasel, Richard H. Scheel, Bruce R. Schmidt, David Arthur Schmidt, Sheri Schmit, George Schneeberg, Elizabeth S. Schneider, Richard R. Schradek, Kristi M Sebastian, Kelly A. Seitter, Melvin Sensenbrenner, Darwin D. Sering, James H. Shea, Patrick J. Shuda, Dennis E. Siegrist, David Siewert, David M. Simon, Thomas A. Sislo, Jerry K. Smith, Philip E. Smith, Eugene A. Smith, Norman N. Snyder, Gary L. Snyder, Robert D. Sobek, LeRoy Henry Sommers, Terry L. Sossaman, Thomas J. Spalding, William J. Spencer, Robert E. Spoerl, Mark J. Sponem, Thomas A. Sprink, Henry W. Stair, Richard E. Stark, John R. Starry, Wayne C. Steffen, David C. Stein, William E. Stein, John J. Steiner, Gregory E. Stelmacher, James F. Stempa, Thomas M. Stemrich, Andrew J. Stensland, David L. Stertz, Thomas P. Stibbe, Robert K. Stockburger, Harvey D. Stodola, John R. Stoffel, Richard M. Story, Ronald J. Strak, Richard B. Strauss, Jerome L. Surber, Gerard M. Swim, Don Q. Syverson, Herbert Szatmary, Phillip M. Szweda, David B. Tamblyn, David Joseph Tapia, Robert Lee Taylor, Arlo W. Tesmer, Robert J. Theel, James F. Thompson, Galen Thompson, Kenneth Tlachac, James R. Tiedeman, Richard B. Toraason, Kimberly M. Tollers, Ellsworth O. Tranberg, Jill Treadway, Craig J. Treadway, Terry A. Treutel, Glen N. Trzebiatowski, Peter S. Trzinski, Gary E. Turk, Michael D. Vande Hei, Gregory A. Vander Velden, Anthony M. Vander Wielen, John H. Vesperman, Mark A. Vesperman, Norbert L. Vissers, Jeffrey Volz, Michael J. Vondrashek, Thomas G. Warnke, John M. Watzka, Robert A. Wazniak, Dale S. Weber, William E. Wegner, Michael Weidler, Paul K. Weidner, Conrad Weiffenbach, George A. Wende, James G. Wendels, Joseph V. White, Wayne E. Whitehead, Keith Wickersham, John B. Wickler, Michael G. Widen, Richard J. Wienfurt, Donald E. Williamson, Keith Alan Wilkinson, Michael G. Williams, Joe R. Wilson, Danny L. Winrich, Dennis Witt, Robert C. Wittlinger, Kurt Wranovsky, Jan M. Wyss, Tou X. Yang, John J. Yelich Jr., William F. Zakrzenski, Eugene Zapata, Wilbur J. Zemlicka, Melvin Zemlicka, Paul R. Zoellner, James L. Zwick and the State Engineering Association.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides, in relevant part:

> The Congress shall have power ...
> To regulate Commerce...among the several States,...

Article IV, Section 4, of the United States Constitution provides, in relevant part:

> The United States shall guarantee to every State in this Union a Republican Form of Government....

Article X of the Amendments to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article XIV, Section 1, of the Amendments to the United States Constitution provides, in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES INVOLVED

5 U.S.C. Part 3, Ch. 75 (Adverse Actions) provides, in relevant part:

SUBCHAPTER I–SUSPENSIONS FOR 14 DAYS OR LESS

§ 7501. Definitions

For the purpose of this subchapter–

(1) "employee" means an individual in the competitive service [continuously employed for one year and who is not on probation].

(2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

§ 7502. Actions covered

This subchapter applies to a suspension for 14 days of less, but does not apply to a suspension [of an administrative law judge (5 U.S.C. § 7521), for national security reasons 5 U.S.C. § 7532, or initiated by Special Counsel investigation].

§ 7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) [Entitling employe to advance notice, opportunity to be heard, representation and written decision articulating reasons.]

(c) [Maintenance or records.]

§ 7504. Regulations

[OPM may prescribe regulations.]

SUBCHAPTER II–...SUSPENSIONS FOR MORE THAN 14 DAYS...

§ 7511. Definitions; application

(a) For the purpose of this subchapter:

(1) "employee" means–

(A) an individual in the competitive service [continuously employed for one year and who is not on probation]; and

(B) a preference eligible in an Excepted Agency in the excepted service [and certain agencies continuously employed for one year];

(2) "suspension" has the meaning as set forth in section 7501(2) of this title.

....

§ 7512. Actions covered

This subchapter applies to–

....

(2) a suspension for more than 14 days [other than for national security reasons or initiated by Special Counsel investigation];

....

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an [employee may be suspended for 14 days or less] for such cause as will promote the efficiency of the service.

(b) [Entitling employe to advance notice, opportunity to be heard, representation and written decision articulating reasons.]

(c) [Agency may allow hearing.]

(d) [Right to appeal.]

(e) [Maintenance of records.]

§ 7514. Regulations

[OPM may prescribe regulations.]

SUBCHAPTER III–
ADMINISTRATIVE LAW JUDGES

§ 7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge...only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are–

....

(2) a suspension [other than for national security reasons or initiated by Special Counsel investigation];

....

SUBCHAPTER IV–NATIONAL SECURITY

....

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. [Procedures for notification and response.]

(b) [Removal after suspension.]

(c) [Due process requirements.]

....

SUBCHAPTER V–SENIOR EXECUTIVE SERVICE

§ 7541. Definitions

(a) For the purpose of this subchapter:

(1) "employee" means a career appointee in the Senior Executive Service who [has completed probation and was covered by subchapter II immediately before appointment to the Senior Executive Service.]

(2) "suspension" has the meaning as set forth in section 7501(2) of this title.

§ 7542. Actions covered

This subchapter applies to a...suspension for more than 14 days [other than for national security reasons or initiated by Special Counsel investigation].

§ 7543. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee [may be suspended for 14 days or] only for such cause as will promote the efficiency of the service.

(b) [Entitling employe to advance notice, opportunity to be heard, representation and written decision articulating reasons.]

(c) [Agency may allow hearing.]
(d) [Right to appeal.]
(e) [Maintenance of records.]

5 U.S.C. Part 3, Ch. 75 (Adverse Actions) – enacted on September 6, 1966 and superceded with the current provisions in 1978 – provides, in relevant part:

SUBCHAPTER I–COMPETITIVE SERVICE

§ 7501. Cause; procedure; exception

(a) An individual in the competitive service may be...suspended without pay only for such cause as will promote the efficiency of the service.

(b) [Entitling employe to advance notice, opportunity to be heard, representation, written decision articulating reasons and maintenance of records.]

(c) [Allowing "preference eligibles" to elect coverage and excluding suspensions for national security reasons.]

SUBCHAPTER II–PREFERENCE ELIGIBLES

§ 7511. Definitions

For the purpose of this subchapter–

(1) [Definition of "preference eligible"]

(2) "adverse action" means a...suspension for more than 30 days,....

§ 7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee,...only for such cause as will promote the efficiency of the service.

(b) [Due process requirements.]

(c) [Does not apply to suspension for national security reasons.]

....

SUBCHAPTER IV-NATIONAL SECURITY

....

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. [Procedures for notification and response.]

(b) [Removal after suspension.]

(c) [Due process requirements.]

....

29 U.S.C. § 203, as amended in 1974, provides, in relevant part:

§ 203. Definitions

As used in this chapter–

(1) ...

(c) "State" means any State of the United States...

(d) "Employer"...includes a public agency....

(e) (1) ...

(2) In the case of an individual employed by a public agency, ["employe"] means–

...

(C) any individual employed by a State...other than such an individual–

(i) who is not subject to the civil service laws of the State...which employs him; and

(ii) who–

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office.

...

(x) "Public agency" means...the government of a State...[or] a State....

29 U.S.C. § 207(a)(1) provides, in relevant part:

(a)(1) ...[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce...for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213(a) provides, in relevant part:

(a) The provisions of section[]...207 of this title shall not apply with respect to–

(1) any employee employed in a bona fide executive, administrative, or professional capacity,...(as such terms are defined and delimited from time to time by regulations of the Secretary [of USDOL], subject to the provisions of [the Administrative Procedures Act, 5 U.S.C. §§ 551-559]...);...

UNITED STATES REGULATIONS INVOLVED

5 C.F.R. Part 551, Subpart B – promulgated by the Office of Personnel Management – provides:

SUBPART B–EXEMPTIONS

§ 551.201 Agency authority.

The employing agency shall exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions as shall be issued by the Office of Personnel Management.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that-

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be exempted.

§ 551.203 Exemption of General Schedule employees.

(a) Any employee properly classified at GS-4 or below (or the equivalent level in other white collar pay systems) shall be nonexempt;

(b) Any employee properly classified at GS-5 through GS-10 (or the equivalent level in other white collar pay systems) shall be exempt only if the employee is an executive, administrative, or professional employee as defined in §§ 551.204, 551.205, and 551.206 of this subpart.

§ 551.204 Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee–

(1) Has authority to select or remove, and advance in pay and promote, or make any other status changes of subordinate employees, or has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercise discretion and independent judgment in such

activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) In addition to the primary duty criterion that applies to all employees, foreman level supervisors in the Federal Wage System (or the equivalent in other wage systems), employees at the GS-7 through GS-9 level subject to section 207(k) of Title 29, United States Code, and employees classified at the GS-5 or GS-6 level (or equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

§ 551.205 Administrative exemption criteria.

An administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria:

(a) The employee's primary duty consists of work that -

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) The employee performs office or other predominantly nonmanual work which is-

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar system) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

§ 551.206 Professional exemption criteria

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of -

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of

which depends of the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

29 C.F.R. § 541.1 – promulgated by USDOL – provides, in relevant part:

§ 541.1 Executive.

The term "employee employed in a bona fide executive * * * capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employee:

(a) Whose primary duty [is managing either the place he is employed or a subdivision of that place]; and

(b) [who directs the work of others]; and

(c) [who has hiring and firing authority]; and

(d) [who normally exercises discretion]; and

(e) [who does not devote more than set percentages of] his hours at work in the workweek to the performance of the work described in paragraphs (a) through (d) [unless

the employe works by themselves or has certain ownership interests]; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . , exclusive of board, lodging, or other facilities: *Provided* [that an employe compensated on a salary basis at not less than $250 per week is presumed to meet certain of the above duties criteria].

29 U.S.C. § 541.2 provides, in relevant part:

§ 541.2 Administrative.

The term "employee employed in a bona fide *** administrative *** capacity" in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) [Performing] office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) [Performing functions in administering an educational facility]; and

(b) [Normally] exercises discretion and independent judgment; and

(c) (1) [Normally] assists a proprietor or [an executive or administrative employe], or

(2) [Under general supervision performs specialized or technical work], or

(3) [Under general supervision executes special assignments or tasks]; and

(d) [who does not devote more than set percentages of] his hours worked in the workweek...to the performance of the work described in paragraphs (a) through (c), of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not

less than $155 per week...exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) [or equal to entry level teachers]: *Provided* [that an employe compensated on a salary basis at not less than $250 per week is presumed to meet certain of the above duties criteria].

29 C.F.R. § 541.3 – promulgated by USDOL – provides, in relevant part:

§ 541.3 Professional.

The term employee *employed in a bona fide* * * * *professional* * * * *capacity* in [29 U.S.C. § 213(a)(1)] shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance [sic] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) [Certain artistic work], or

(3) [Certain teaching or instructing work], or

(4) [Certain computer-related work]; and

(b) Whose work requires [discretion and judgment]; and

(c) Whose work is predominantly intellectual and varied in character [such that the results or output cannot be standardized to a given period of time]; and

(d) [who does not devote more than set percentages of] his hours worked in the

workweek to activities [other than as described in paragraphs (a) through (c)]; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week...exclusive of board, lodging, or other facilities: *Provided*, [that an employe compensated on a salary or fee basis at not less than $250 per week is presumed to meet certain of the above duties criteria].

29 C.F.R. § 541.5d effective as of September 18, 1992 (57 Fed. Reg. 37666 and 37677) – promulgated by USDOL – provides:

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under § 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because–

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employe of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough

occurs and for which the employe's pay is accordingly reduced.

29 C.F.R. § 541.5d, effective from September 6, 1991 (56 Fed. Reg. 45824) until superseded on September 18, 1992 (57 Fed. Reg. 37666) – promulgated by USDOL – provided:

> **§ 541.5d Special Provisions Applicable to Public Sector Employers (Federal, State and Local Governments)**
>
> (a) A Federal, State or local government employee ("Public employee") who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 of this part on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or public policy under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave (because the leave has been exhausted or by the employer's choice), requires the public employee's pay to be reduced ("leave without pay") for absences, for personal reasons or because of illness or injury, of less than one work-day.
>
> (b) Deductions from a public employee's pay that are not regular and recurring for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which such deductions occurred.

WISCONSIN STATUTES INVOLVED

Section 15.001, Wis. Stats., provides, in relevant part:

> **15.001 Declaration of policy.** (1) THREE BRANCHES OF GOVERNMENT. The "republican form of government" guaranteed by the U.S. constitution [at Art. IV, Sec. 4] contemplates the

separation of powers within state government among the legislative, the executive and the judicial branches of the government. [Defines the duties of the three branches and that they are to be kept separate.]

....

(2) GOALS OF EXECUTIVE BRANCH ORGANIZATION. (a) As the chief administrative officer of the state, the governor should be provided with the administrative facilities and the authority to carry out the functions of the governor's office efficiently and effectively within the policy limits established by the legislature.

....

(c) The organization of state government shall assure efficient and effective administration of the policies established by the legislature. It is the goal of reorganization to promote efficiency by improving the management and coordination of state services and by eliminating overlapping activities.

....

Section 16.415, Wis. Stats., provides, in relevant part:

16.415 Certification of payrolls. (1) [No] fiscal officer of this state may [allow the payment of] any compensation to any person in the classified service of the state unless an estimate, payroll or account for such compensation, containing the names of every person to be paid, bears the certificate of the appointing authority that...the pay for [each person named in the estimate, payroll or account] has been established in accordance with, the law, compensation plan or applicable collective bargaining agreement, and rules of the secretary of employment relations and the administrator of the division of merit

recruitment and selection in the department of employment relations then in effect.

. . .

(3) Any sums paid contrary to this section may be recovered from any appointing authority making such appointments in contravention of law or of the rules promulgated pursuant thereto, or from any appointing authority signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on the official bond of any such appointing authority, in an action in the circuit court for any county within the state, maintained by the secretary of employment relations, or by a citizen resident therein, who is assessed for, and liable to pay, or within one year before the commencement of the action has paid, a state, city or county tax within this state. All moneys recovered in any action brought under this section when collected, shall be paid into the state treasury except that if a citizen taxpayer is plaintiff in any such action he or she shall be entitled to receive for personal use the taxable cost of such action and 5% of the amount recovered as attorney fees.

Section 16.53, Wis. Stats., provides, in relevant part:

16.53 Preaudit procedure. The department of administration shall preaudit claims in accordance with the following procedures:

. . .

(b) *Payrolls.* Payrolls, to be entitled to audit, shall be certified by the proper officers who shall set forth the nature of the services rendered by each person named therein.

. . .

Section 20.923, Wis. Stats., provides, in relevant part:

20.923 Statutory salaries. The purpose of this section is to establish a consistent and equitable salary setting mechanism for all elected officials, appointed state agency heads, division administrators and other executive-level unclassified positions. All such positions shall be subject to the same basic salary establishment, implementation, modification, administrative control and application procedures. The salary-setting mechanism contained in this section shall be directed to establishing salaries that are determined on a comprehensive systematic basis, bear equitable relationship to each other and to the salaries of classified service subordinates, and be reviewed and established with the same frequency as those of state employes in the classified service.

....

(16) OVERTIME EXCLUSION. The salary paid to any person whose position is included under subs. (2), (4), (4m), (5) and (8) to (12) is deemed to compensate that person for all work hours. No overtime compensation may be paid to any such person for hours worked in any workweek in excess of the standard basis of employment as specified in s. 230.35 (5) (a).

....

Section 111.90, Wis. Stats., provides, in relevant part:

111.90 Management rights. Nothing in this subchapter [governing collective bargaining agreements as to State employes] shall interfere with the right of the employer, in accordance with this subchapter to:

(1) Carry out the statutory mandate and goals assigned to the agency utilizing personnel, methods and means in the most appropriate and efficient manner possible.

(2) Manage the employes of the agency; hire, promote, transfer, assign or retain employes in positions within the agency; and in that regard establish reasonable work rules.

(3) Suspend, demote, discharge or take other appropriate disciplinary action against the employe for just cause;....

Section 111.91, Wis. Stats., provides, in relevant part:

111.91 Subjects of bargaining. . . .
(2) The employer is prohibited from bargaining on . . .
(c) Disciplinary actions . . . governed by s. 230.34 (1) (a), (am) and (ar), except as provided in those paragraphs.

Section 230.01, Wis. Stats., provides, in relevant part:

230.01 Statement of policy. (1) It is the purpose of this chapter to provide state agencies and institutions of higher education with competent personnel who will furnish state services to citizens as fairly, efficiently and effectively as possible.

(2) It is the policy of the state...to maintain a system of personnel management which fills positions in the classified service through methods which apply the merit principle, with adequate civil service safeguards. It is the policy of this state to...ensur[e] that all personnel actions...be based on the ability to perform the duties and responsibilities assigned to the particular position.... It is the policy of the state to ensure its employes opportunities for satisfying careers and fair treatment based on the value of each employe's services....

....

Section 230.34, Wis. Stats., provides, in relevant part:

230.34 ...[S]uspension...(1) (a) An employe with permanent status in class...may be...suspended without pay...only for just cause.

....

(b) No suspension without pay shall be effective for more than 30 days. The appointing authority shall, at the time of any action under this section, furnish to the employe in writing the reasons for the action.

(c) The secretary [of the department of employment relations] shall establish guidelines for uniform application of this authority among the various agencies.

....

Section 230.44, Stats., provides, in relevant part:

230.44 Appeal procedures. (1) APPEALABLE ACTIONS AND STEPS. . . . [T]he following are actions appealable to the [personnel] commission under s. 230.45 (1) (a):

. . .

(c) . . . [S]uspension . . . . If an employe has permanent status in class . . . , the employe may appeal a . . . suspension . . . to the commission, if the appeal alleges that the decision was not based on just cause.

NONREGULATORY AGENCY INTERPRETATIONS INVOLVED

29 C.F.R. § 541.118 – issued by USDOL – provides, in relevant part:

> **§ 541.118 Salary basis.**
>
> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
>
> (1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
>
> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such day or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis' requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made where there is no work available, it indicates there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantees plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations.

Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employe performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $250 in each week in which any work is performed, and an additional $50 which is made subject to deductions which are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

29 C.F.R. § 541.314 – issued by USDOL – provides, in relevant part:

§ 541.314 Exception for physicians, lawyers, and teachers.

(a) A holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, or a holder of the requisite academic degree from the general practice of medicine who is engaged in an internship or resident program pursuant to the practice of his profession, or an employee employed and engaged as a teacher in the activity of imparting knowledge, is excepted from the salary or fee requirement. This exception applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions.

(b) In the case of medicine:

[those excepted are defined.]

(c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dieticians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

FEDERAL REGISTER PUBLICATIONS INVOLVED

3 Fed. Reg. 2518 (October 20, 1938) – published by USDOL as to 29 C.F.R. Part 541 – states, in relevant part:

> The following regulations–Part 541–(Regulations defining and delimiting the terms "any employee employed in a bona fide executive, administrative, professional,...capacity,...pursuant to [29 U.S.C. § 213(a)(1)]) are hereby issued....
>
> ....

> SECTION 541.1 *Executives and Administrative.* The term "employee employed in a bona fide executive [and] administrative...capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employe [performing duties within defined scope of regulation] and who is compensated for his services at not less than $30 (exclusive of board, lodging, or other facilities) for a workweek.
>
> SECTION 541.2 *Professionals.* The term "employee employed in a bona fide...professional...capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employe [performing duties within defined scope of regulation which make no mention of any compensation requirement].
>
> ...
>
> SECTION 541.5 *Petition for Amendment of Regulations.* ....In determining such future regulations, separate treatment for different industries and for different classes of employes will be given consideration.

5 Fed. Reg. 4077-4078 (October 15, 1940) – published by USDOL as to 29 C.F.R. Part 541 – states, in relevant part:

> ....These regulations repeal and supercede all regulations previously issued defining and delimiting the terms "any employees employed in a bona fide executive, administrative, professional...capacity..." and shall become effective October 24, 1940, and shall continue in force and effect until hereafter modified.
>
> ....
>
> SECTION 541.1 *Executives and Administrative.* The term "employee employed in a bona fide executive [and] administrative...capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employe

[performing duties within defined scope of regulation] and

(e) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities),...

...

SECTION 541.3 *Professional.* The term "employee employed in a bona fide * * * professional * * * capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employe who is–

[performing duties within defined scope of regulation], and

(b) compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities); *Provided* That this subsection (b) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.

...

SECTION 541.6 *Petition for Amendment of Regulations.* ....In determining such future regulations, separate treatment for different industries and for different classes of employes may be given consideration.

19 Fed. Reg. 1321-1322 (March 9, 1954) – published by USDOL as to 29 C.F.R. § 541.118 – states, in relevant part:

COMPENSATION "ON A SALARY BASIS"

Notice is hereby given that [USDOL] proposes to amend § 541.118 of Part 541, Subpart B (29 C.F.R. Part 541), as follows:

...

(5) ... Penalties imposed in good faith for infractions of safety rules, or for other major disciplinary reasons, will not affect the employee's salaried status.

...

Prior to the final adoption of the proposed amendment set forth above, consideration will be given to any views, arguments or data pertaining thereto [submitted to USDOL] within 30 days [of publication].

19 Fed. Reg. 4405-4406 (July 17, 1954) – published by USDOL as to 29 C.F.R. § 541.118 – states, in relevant part:

COMPENSATION "ON A SALARY BASIS"

....

The comments [received in response to the March 9, 1954 notice] have been carefully considered. On the basis of the comments, the provision that penalties may be imposed for major disciplinary reasons has been deleted, and the provision regarding penalties for infractions of safety rules has been clarified. The modified language will be found in § 541.118(a)(5). In all other respects, the amendment is adopted as proposed.

...

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant or other employes, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

33 Fed. Reg. 12491 to 12494 (September 4, 1966) – published by the Civil Service Commission as to 5 C.F.R. Part 752 (Adverse Actions by Agencies) – state, in relevant part:

Subpart A–General Provisions

§ 752.101 Applicability

This part applies to...suspensions...of employees of the Government of the United States....

...

§ 752.104 General standards

(a) An agency may not take an adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service....

....

Subpart B–...Suspensions for More Than 30 days,...

§ 752.201 Coverage.

(a) *Employees covered.* [All employees in competitive service who have continually served for one year and are not on probation.]

(b) *Adverse actions covered.* This subpart applies [to suspensions for more than 30 days with certain exceptions.]

§ 752.202 Procedures

[Sets forth procedure for advance notice, opportunity to respond and notice of suspension decision.]

§ 752.203 Appeal rights to the Commission.

[Right to appeal to Commission.]

Subpart C–Suspensions of 30 Days or Less

§ 752.301 Coverage

(a) *Employees covered.* [All employees in competitive service who have continually served for one year and are not on probation.]

(b) *Adverse actions covered.* This subpart applies to suspensions of 30 days or less [with certain exceptions].

...

§ 752.302 Procedures

[Sets forth procedure for advance notice, opportunity to respond and notice of suspension decision.]

§ 752.303 Emergency procedures

[Allows agency to respond rapidly to need to avoid] damage to Government property or [circumstances] detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public....

§752.304 Appeal rights to the Commission.

[Provides employees suspended for less than 30 days limited rights to appeal to the Commission.]

38 Fed. Reg. 11390 and 11392 (May 7, 1973) – published by USDOL as to 29 C.F.R. Part 541 – state, in relevant part:

The revised 29 CFR part 541 reads as follows:

....

Subpart A–General Regulations

....

§ 541.6 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition....In determining such future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

Subpart B–Interpretations

§ 541.99 Introductory statement.

(a) [29 U.S.C. § 213(a)(1)] exempts from the wage and hour provisions of the act "any employee employed in a bona fide executive, administrative, or professional capacity...(as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act,... The [re]quirements of the exemption under this section of the act are contained in subpart A of this part.

....

§ 541.118 Salary basis.

....

39 Fed. Reg. 33255 (September 16, 1974) – published by the Civil Service Commission pursuant to 29 U.S.C. §§ 204(f) and 213(a)(1) as amended in 1974 – states, in relevant part:

> DEFINITION OF "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY"
>
> **Notice of Hearing**
>
> Pursuant to [29 U.S.C. §§ 204(f) and 213(a)(1)] notice is hereby given of a public hearing to be held [by the Commission].
>
> The purpose of the hearing is to obtain information, suggestions, or proposals in regard to proposed rulemaking to define the term "any employee employed in a bona fide executive, administrative, or professional capacity" for application to those employees of the U.S. Government for whom the U.S. Civil Service Commission administers the Fair Labor Standards Act. The specific issues to be explored include reasonable alternatives to the criteria established by the Secretary of Labor (including the use of salary tests, and the percentage of time limitations on nonexempt work), and recommendations for modification or expansion of the interim instructions issued by the Commission on the application of the exemption for executive, administrative, and professional employees.
>
> Although the regulation to be developed by the [Commission] will "apply to employees of the U.S. Government only, the hearing is open to the public and presentations will be accepted from other parties interested in the compatibility with regulations of the Secretary

of Labor which apply to State and local governments and other employees.

. . .

40 Fed. Reg. 27640 to 27641 – published by the Civil Service Commission to create 5 C.F.R. Part 551 (Pay Administration Under the Fair Labor Standards Act) effective July 1, 1975 – stated:

PART 551 – PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

Exemptions

A new Part 551 is being added to Chapter I of 5 CFR, under [29 U.S.C. § 204(f)] as amended by Pub. L. 93-259 enacted April 3, 1974, which states:

> Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than any individual employed by the United States Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority).

Partial regulations governing exemptions are issued at this time, with regulations on other aspects to follow.

These regulations are issued without prior publication in proposed form. Because this is a matter relating to agency management and personnel practices, the provisions of the Administrative Procedure Act (now codified in 5 U.S.C. 553) concerning notice of proposed rule-making, opportunity for public participation, and delay in effective date are inapplicable.

The Civil Service Commission has, however, provided opportunity for all interested parties, including Federal agencies and employee organizations, and the public to comment on the issues covered by the exemption regulations. This opportunity was provided through circulation, in July 1974, to Federal agencies and unions representing Federal employees, of a draft proposing expansion of the interim instruction on exemption criteria with a request for comment, and through a formal public hearing notice of which was published on September 16, 1974 in the Federal Register (39 FR 33255).

The comments received reflected widely divergent views concerning the exemption criteria. The Commission has resolved the issues raised in terms of the policy of integrating exemption criteria with Federal classification systems to the extent possible, while maintaining results consistent with the exemption criteria applied by the Department of Labor.

In accordance with the foregoing, Chapter I of Title 5 of the Code of Federal Regulations is amended by adding a new Part 551, reading as follows:

....

Subpart B - Exemptions

....

§551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that:

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be so exempted.

§ 551.203 Exemption of executive, administrative, and professional employee.

The employing agency shall exempt any employee who is an executive, administrative, or professional employee as defined herein.

(a) An executive employee is a supervisor, foreman, or manager who supervises at least three subordinate employees and who meets all of the following criteria:

(1) The employee's primary duty consists of management or supervision.

(2) The workers supervised constitute a recognized organizational unit.

(3) The employee regularly exercises discretion and independent judgment, under only general supervision, in planning, directing and controlling the work of the unit supervised.

(4) The employee performs significant personnel management duties.

(5) The employee's position is classified no lower than General Schedule Grade 5 (GS-5) or the equivalent level in other white collar pay systems, or the employee fully meets or exceeds the "Foreman range of responsibility" defined in the job grading standard for Wage Supervisors, if under the Federal Wage System or equivalent prevailing rate systems.

(6) In addition to the primary duty criterion that applies to all employees, Foreman level supervisors in the Federal Wage System or the equivalent in other wage systems, and employees classified below GS-10 or the equivalent in other white collar pay systems, must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

(b) An administrative employee is an advisor, assistant or representative of management, or a specialist in a management or

general business function or supporting service who meets all of the following criteria:

(1) The employee's primary duty consists of work that:

(i) Significantly affects the formulation or execution or management policies or programs; or

(ii) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(iii) Involves substantial participation in the executive or administrative functions of a management official.

(2) The employee performs office of other predominantly nonmanual work which is:

(i) Intellectual and varied in nature, or

(ii) Of a specialized or technical nature that requires considerable special training, experience and knowledge.

(3) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(4) The employee's position is classified no lower than GS-7 or the equivalent level in other white collar pay systems.

(5) In addition to the primary duty criterion that applies to all employees, General Schedule employees below GS-10, or the equivalent in other salary systems, must spend 80 percent or more of the worktime in a representative work week on administrative functions and work that is an essential part of those functions.

(c) A professional employee is an employee who is practicing a learned or artistic profession and who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration

of an academic program in a school system or educational establishment.

(1) The employee's primary duty consists of:

(i) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(ii) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee.

(2) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(3) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(4) The employee's position is classified no lower that GS-7 or the equivalent level in other white collar pay systems.

(5) In addition to the primary duty criterion that applies to all employees, General Schedule employees below GS-10, or the

equivalent in other salary systems, must spend 80 percent or more of the worktime in a representative workweek on professional functions and work that is an essential part of those functions.

§ 551.204 Exemption of employees serving in foreign areas.

[Exempting employes working outside United States and its territories.]

Effective date: July 1, 1975.

44 Fed. Reg. 3440, 3444-3445 (January 16, 1979) – published by the Office of Personnel Management to implement the Civil Service Act of 1978 – states, in relevant part:

PART 752–ADVERSE ACTIONS

...

...[I]n order to provide continuity of operations and to give immediate and timely effect to the appropriate provisions of the Civil Service Reform Act of 1978...the Office of Personnel Management is revising 5 CFR Part 752 as set forth below:

...

48 Fed. Reg. 49494 (October 25, 1983) – published by the Office of Personnel Management as to 5 C.F.R. Part 551 – states, in relevant part:

OPM's Role as Administrator of the FLSA in the Public Sector

We believe that most of the comments opposing the proposed rules reflect a general misunderstanding of OPM's role as Administrator of the FLSA for the Federal sector. On the one hand, OPM is charged with the responsibility to administer the FLSA "in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and

> opinions of the Secretary of Labor which are applicable in other sectors of the economy." (H.Rept. 93-913, March 15, 1974, p.28) On the other hand, the Congress realized that, when applied to the Federal sector, the FLSA would cause conflicts with existing, valid Federal pay and classification statutes (chiefly contained in title 5, United States Code). It was this recognition that led to the express grant of authority to [the Civil Service Commission] [now OPM] of "the authority to determine who in the Federal work force is covered." (120 Cong. Rec. 7335.)
>
> The legislative history [of the 1974 FLSA Amendments] recognizes that a literal adherence to [USDOL] regulations is not possible in the face of Federal personnel statutes, and that it is OPM's responsibility to reconcile these conflicts to the maximum extent practicable, while preserving the basic purpose of the FLSA.
>
> ....
>
> ....If OPM were to literally interpret its responsibility to be consistent with DOL it would apply a pure salary test, tied directly to the DOL figures....However, OPM is concerned not only with its mandate for consistency, but also with its concurrent responsibility to integrate the administration of the FLSA into the Federal pay and position classification process....[W]e have repeatedly emphasized [that] the position classification system is a *job evaluation* process which is a more logical system for defining exemption for Federal employees than gross weekly salary.

50 Fed. Reg. 47696-47997 (November 19, 1985) – published by USDOL as to 29 C.F.R. Part 541 – states, in relevant part:

> **SUMMARY:** The Wage and Hour Division is considering proposing revisions [to 29 C.F.R.

> Part 541]....Comments are invited concerning the current definitions of terms relating to the salary, duties, and responsibilities tests for [exempt] employees, as well as the interpretations of such definitions.
>
> ...
>
> Accordingly, comments are sought from interested parties concerning the matters set forth below, as well as any other issues of interest under this regulation.
>
> **I. Salary Tests.**
>
> ....Comments are sought with respect to the following matters related to the salary tests:
>
> ....
>
> 2. Should the salary tests be eliminated? If so, what tests should [USDOL] rely on to determine applicability of the 29 U.S.C. § 213(a)(1)] exemption? What would be the economic impact of the elimination of the salary tests?
>
> ....
>
> 10. Should [USDOL] recognize individual State and local government civil service systems for classifying [executive, professional and administrative] employees in applying the exemption to employees of such governments? Such recognition would not alter the traditional FLSA principle that an employer who claims an exemption under the Act has the burden of showing that it applies.

51 Fed. Reg. 2525 (January 17, 1986) – published by USDOL as to 29 C.F.R. Part 541 – states, in relevant part:

> This document extends the period for filing comments [on the issues noted in the Federal Register for November 17, 1985 from January 21, 1986 to] March 22, 1986.
>
> ....

....The agency believes that an extension of the comment period is appropriate because a number of interested parties have requested such an extension in order to permit them to complete a full examination of the advance notice of proposed rulemaking and provide comprehensive comments.

51 Fed. Reg. 7425 (March 4, 1986) – published by the Office of Personnel Management as to 5 C.F.R. Part 551 – states, in relevant part:

....A direct application of [USDOL] regulations to Federal employees is not feasible because DOL regulations do not take into account existing, sometimes conflicting, pay and classification statutes.

...[A union] recommended a cut-off salary... for determining presumed exemption....[A]s we repeatedly have emphasized, the position classification system is a *job evaluation* process which is more logical system for defining exemption for Federal employees than gross weekly salary.

52 Fed. Reg. 2102, 2109, 2023 (January 16, 1987) – published by USDOL as to 29 CFR Part 553 (Application of the Fair Labor Standards Act to Employees of State and Local Governments) – states, in relevant part:

[Commentators] requested various forms of special treatment for State and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 CFR Part 541 that such employees be paid on a salary basis....

On November 19, 1985, [USDOL] published in the Federal Register (50 FR 47696)

an advance notice of proposed rulemaking requesting the views of the public on any changes they felt were necessary in 29 CFR Part 541. The comment period ended March 22, 1986. However, [USDOL] expects to publish a notice of proposed rulemaking concerning Part 541 during 1987. Interested parties will have the opportunity to offer comments on the subject matter of that regulation at that time.

In light of the separate rulemaking process with respect to Part 541, it would not be appropriate for [USDOL] to address this issue in developing a final rule for Part 553.

56 Fed. Reg. 45824 (September 6, 1991) – published by USDOL as to 29 C.F.R. Part 541 – with footnotes omitted except where noted, states, in relevant part:

SUMMARY: .... The purpose of this revision is to provide an exception from certain provisions requiring payment "on a salary basis" applicable only to public sector employees.
DATES: Effective Date: The interim final rule is effective on September 6, 1991.

....

I. Background

Since...1938, Congress and the Supreme Court have each periodically acknowledged the special circumstances of, and the different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from employment in the private sector.

The regulations governing exemption...require [exempt employees to meet standards as to] both their duties and their compensation.... These regulations were adopted prior to the extension of FLSA coverage to public employees and, therefore, make no

distinction between public and private employment.

In administering the FLSA in the public sector, the Department has become aware that few public employers compensate employees in a manner that meets the "on a salary basis" requirement for exemption under the current regulation. Governmental payroll systems commonly prohibit paying employees for time not actually worked. Systems of leave in the public sector (as often is the case in the private sector) are generally relied on as the exclusive method to permit employees who might otherwise not be compensated for periods of absence to avoid reduction of compensation in connection with such absences.

The Department initially attempted to address this problem by means of an enforcement policy, adopted by the Wage and Hour Division on January 9, 1987. The policy, which is still in effect, provides that the Division, will not deny exemption...to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applies only where applicable State or local law, in effect before April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

[This] 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. Since...Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), there have been numerous lawsuits by public employees to recover overtime pay. The

courts...have approached the construction of the regulations in different fashions, and have reached differing results.

Some...found the exemption to be inapplicable for the sole reason that the public entity's pay practices did not meet the "on a salary basis" requirement. Construing the existing regulations, some courts have held that employees under a pay system which requires that deductions be made when the employee is absent and has no leave are not paid "on a salary basis" even where no such deductions have occurred. In these circumstances the "salary basis" requirement is not met because the employee's compensation was subject to deductions for absences of less than one day when all accumulated leave was exhausted. [Citations omitted.]

On the other hand, some courts have considered that even in the above-described circumstances a salary was not subject to deduction where there was no evidence that the employee's pay was ever reduced, that only actual and not "theoretical" deductions could invalidate the salary basis of compensation, and that rare instances of docking pay for absences of less than a day did not defeat the exemption (except in a workweek in which deduction was made). [Citations omitted.] Some courts have also allowed application of the "correction" provisions at 29 CFR 541.118(a)(6) to preserve exempt status in cases where the public employer made "inadvertent" deductions from pay for absences of less than a day when leave was exhausted, reimbursed the affected employee for such deductions, and promised future compliance. [Citations omitted.]

The Department has been considering (and continues to consider) a variety of possible changes to the regulations governing the

exemption...including the particular requirement in the public sector that such employees be paid on a salary basis.

In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. Such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices that were designed and intended to serve the public trust and were established long before State and local government employees were subject to the Fair Labor Standards Act.

State and local government jurisdictions have varied pay policies. Some of these pay policies are based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. These pay systems are generally premised on the concept–based on principles of public accountability–that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds.

For these reasons the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. These aspects are not, in the Department's judgment, valid indicators in the public sector of the bona fides of a claimed

exemption under section 13(a)(1). State and local governments are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt.

While the Department is continuing its overall review of the full range of issues raised by the public comments submitted on its advance notice of proposed rulemaking of November 19, 1985 (50 FR 47696), it is undertaking this separate rulemaking on the specific issue of application of the "salary basis" of payment for public sector employees. As discussed below, it is considered necessary to issue an interim final rule so as to stem any accrual of additional liability to State and local governments while consideration is given to the comments received on the rule.

....

III. Summary of the Rule.

A new § 541.5d is being added that provides that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one work-day, will not be disqualified from exemption due to such pay system. This rule also provides that the exemption will not be defeated by deductions from salary caused by budget-required furloughs, which are not regular and recurring, except in the workweek in which such a deduction occurs.

...

Publication as an Interim Final Rule

Application of the salary basis test to State and local government employees may result in denial of the exemption to thousands of such employees who have been considered exempt by their employers. The Department considers it inappropriate that public sector employees be

denied the exemption because they fail to meet the "on a salary basis" test under pay systems imposed by law, regulation or public policy that were established pursuant to principles of public accountability even before extension of the Act to such employees. Such application could well result in enormous, unforeseen liability of such governments and may threaten their fiscal integrity. For these reasons it has been determined that an interim final rule is appropriate to forestall accrual of additional liability while the Department receives and considers comments in the preparation of any final rule which would be determined to be appropriate. Accordingly, the Secretary finds, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public comment are contrary to the public interest.

For the same reasons, the Secretary also for good cause finds, pursuant to 5 U.S.C. 553(d)(3), that this rule cannot be published 30 days before its effective date.

57 Fed. Reg. 37666 (August 19, 1992) – published by USDOL -- with footnotes omitted except where noted, states, in relevant part:

SUMMARY: This document provides revised final Regulations, 29 CFR part 541, governing the criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act ("FLSA" or "Act") for public sector employees employed in bona fide executive, administrative, and professional capacities. A special, limited exception from the exemption's requirement for payment "on a salary basis" is provided for certain public sector pay systems that reduce the pay of otherwise-exempt employees for partial-day absences when paid leave is not used

to cover such absences, and for deductions due to budget-required furloughs.

EFFECTIVE DATE: September 18, 1992.

....

II. Background

A. Summary of Statutory and Regulatory Provisions

...

The salary requirement has been an integral part of the 541 regulations since 1940. The existing regulatory interpretation of "salary basis" dates back to 1954 (19 FR 4405; July 17, 1954). These provisions were developed from extensive hearings and record evidence showing that executive, administrative, and professional employees employed in industries then-subject to the FLSA, which excluded governmental employers, were nearly universally paid on a salary basis. Employers not compensating on a salary basis have had ample opportunity to conform their pay practices to the requirements if they chose to claim exemption for their employees, or pay overtime premium pay. In contrast, the public sector pay policies at issue in this rulemaking evolved over the years subject to constraints in statutes, ordinances or policies based on public accountability principles that preclude paying public employees for hours not worked, under systems that regarded management employees as being exempt from overtime.

B. Legislative History of the FLSA in the Public Sector

Since...1938, the Congress and the...Court have periodically acknowledged the special circumstances of, and different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from the private sector. Originally, the FLSA did not apply to employees of States or political

subdivisions. Congress extended coverage in 1966 to [certain] employees of State and public entities.... The...Court upheld the constitutionality of applying the Act to such entities in *Maryland v. Wirtz*, 392 U.S. 183 (1968).

In 1974, Congress extended coverage to all public sector employees, exempting only elected officials and their immediate staffs. It did so with the stated intent to cover virtually all public sector employees who were not within the scope of the section 13(a)(1) exemption....

In 1976, however, the...Court considered the special nature of State and local governments under the FLSA and ruled that the FLSA's minimum wage and overtime pay provisions could not constitutionally be applied to State and local government employees engaged in traditional governmental activities. (*National League of Cities v. Usery*, 426 U.S. 833 (1976).)....

In 1985, the Supreme Court reversed National League in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).... In response to Garcia, Congress amended the FLSA in November 1985 to address particular concerns of State and local governments and to provide relief from liability during a temporary adjustment period after the Garcia decision. New provisions were added to allow the use of compensatory timeoff in lieu of cash wages for overtime in the public sector, with a higher maximum limit on the number of hours that can be accumulated by public safety and certain other employees; to include overtime exemptions for certain employment situations in which employees work dual jobs; and to provide special rules for public agency volunteers. The 1985 Amendments did not, however, affect section 13(a)(1) of the Act or specifically address the application of the...exemption to State and

local government employees. Neither the statutory changes nor the legislative history of the 1985 Amendments contain any significant references to section 13(a)(1) or 29 CFR part 541.

C. Public Sector Pay Systems and the FLSA

Some State and local government jurisdictions operate pay policies based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. The rules and procedures of many of these pay systems were in place long before FLSA coverage of the public sector brought on by the 1985 Garcia decision. Such pay systems are generally premised on a concept derived from principles of public accountability that governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds.

At the time of Garcia, therefore, most public employers had in place compensation systems requiring all employees, regardless of how paid, to use accrued leave time or incur a reduction in pay for any absences from work. Such Governmental payroll systems prohibited paying employees for time not actually worked that was not covered by accrued leave, regardless of whether the time not worked was greater or less than one full work-day. Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt. As a consequence, few public employers compensated employees in a manner that would satisfy the "on a salary basis" provision required by the regulations.

The Department first observed this anomaly when responding to written inquiries

from public sector employers following the Supreme Court's Garcia decision in 1985. It was also raised in public comments received on the Department's Advance Notice of Proposed Rulemaking (ANPR) on Part 541 published in the Federal Register on November 19, 1985 (see 50 FR 47696), before the 1985 FLSA Amendments went into effect. One issue raised in the ANPR was whether the salary tests for exemption should be increased or eliminated.

During this same time frame, the Office of Personnel Management (OPM) issued regulations on the 541 exemption for executive, administrative, and professional employees of the federal government. Under OPM's regulations, exempt status was determined according to grade level and the position classification system rather than salary, and did not include a "salary basis" requirement. With this background, the ANPR also raised the question "(s)hould the Department recognize individual State and local government civil service systems for classifying (executive, administrative, and professional) EAP employees in applying the exemption to employees of such governments?"

Two commenters responding to the ANPR pointed to the conflict between State and local laws and § 541.118 by noting that State or local laws frequently prohibit employees from being paid for time not actually worked, or not covered by annual, sick, or other types of paid leave. These commenters cited the example of an otherwise exempt public employee who is absent from work for personal reasons, or is unable to work because of illness or accident, where the employee has not accrued, or has exhausted, paid leave time, being paid only for the hours actually worked in accordance with applicable State or local law. Consequently, a public employer that makes deductions from pay

for absence(s) computed on an hourly basis would not be in compliance with the "salary basis" requirements in § 541.118 that allow for deductions to be made in such cases only for absence(s) of a full day or longer.

The Department also received comments expressing concerns about the "salary basis" requirement for exemption for public sector employers in response to proposed regulations issued to implement the 1985 FLSA Amendments (51 FR 13402; April 18, 1986). These comments were noted in the preamble to the final rule as follows:

[Noting expressed concerns about the application of the salary basis test to public employers was, in 1985 and 1986 being examined in a separate rulemaking process – which USDOL expected to finalize in 1987 – and that USDOL stated those concerns would not be considered or addressed at that time.]

D. The Department's 1987 Enforcement Policy

The Department initially attempted to address the special circumstances of the public sector by means of an enforcement policy issued by the Wage and Hour Administrator on January 9, 1987, as follows:

It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment described in § 541.118 of 29 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay absence(s) on an hourly basis which is contrary to

the position in § 541.118 that deductions may be made only for absence(s) of a day or longer.

Revisions to the provisions of 29 CFR part 541, including the salary tests, have been under consideration as indicated in the Advance Notice of Proposed Rulemaking (ANPR) published in the Federal Register on November 19, 1985 (50 FR 47696). .... A commenter representing public employers has pointed out the problem described above and has proposed changes in § 541.118 that would allow deductions to be made for absence(s) of less than a day, or to eliminate the salary test entirely.

While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

....

....

E. Developments in Private Lawsuits

[This] 1987 enforcement policy expressly stated that it was not intended to affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. [Footnote omitted.] Since the Supreme Court's Garcia decision in 1985, numerous lawsuits have been filed by public employees seeking to recover overtime premium pay from their employers, and in many of these cases the resolution of the exempt status of employees turned solely on the court's reading of the "salary basis" requirement in the regulations. The courts have interpreted

the construction of the regulations in different ways, reaching different results.

[Reiterating varying judicial interpretations noted in 56 Fed. Reg. 45824 (September 6, 1991).]

Such judicial interpretations and accompanying confusion were exposing governmental employers to potentially enormous and generally unexpected back wage liabilities for many employees who would clearly be exempt but for the treatment of leave and the docking of pay for partial-day absences when leave was unavailable. Following the denial of certiorari (January 1991) and petition for rehearing (March 1991) in Abshire, representatives of State and local governments,...presented their u[r]gent concerns to the Department arising from the flood of lawsuits being filed by public employees and requested prompt action by the Department to address the matter in light of the anticipated effects of post-Abshire litigation.

These State and local government representatives indicated that, without immediate action by the Department of Labor to revise the regulations for State and local governments, the potential liabilities for affected governmental entities would become devastating. They expressed concern over the fundamental inequity of courts granting windfall awards of across-the-board retroactive overtime payments to public employees who never had any actual deductions made in their salaries, along with employees who rarely had such deductions, but all of whom would be entitled to substantial back pay under Abshire simply because their salaries were theoretically "subject to" the possibility of docking.[8] They asserted that this resultant windfall was not required by [sic], and that

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[8]Mayor David Dinkins of New York City described the situation in an August 14, 1991 letter to Secretary of Labor Lynn Martin as follows:

The City of New York, along with many other jurisdictions, faces serious fiscal problems. To meet those

problems we have already cut services and laid off thousands of employees. The layoff of State and local government Abshire [v. County of Kern, 906 F.2d 483, (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785, *rehearing denied*, 111 S.Ct. 1341 (1991) which held exemptions were lost even if no deductions had actually been made so long as deductions could have been made] was an extreme interpretation of, DOL's regulations. [Summary of views presented by State and local representatives.]....

F. The Department's September 1991 Rulemaking

Because of concerns that the unexpected liabilities threatened to seriously impair the fiscal integrity of many State and local governmental agencies, and would disrupt widespread, long-standing pay practices that had been designed to serve the public trust, the Department undertook separate rulemaking on the specific issue of application of the "salary basis" rule to public sector employees, while continuing its overall review of the full range of issues under 29 CFR part 541 raised by the public comments submitted on its ANPR of November 19, 1985 (50 FR 47696). Recognizing the special circumstances of public sector employment, under which employees are paid pursuant to pay systems established according to principles of public accountability, and in light of the potentially enormous, unforeseen liability which could threaten the governments' fiscal integrity as a result of retroactive overtime

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employees has been cited by the staff of the Federal Reserve Board as a reason for the continuing weakness in the economy. To exacerbate those fiscal problems and those layoffs to pay overtime to management employees because of the application to the public sector of a regulation designed for the private sector would be contrary to the public interest.

payments to public employees considered exempt by their employers, the Department proceeded with rulemaking on an expedited basis, finding good cause to waive the normal requirement for prior notice and comment.

The Department published an Interim Final Rule (IFR) on September 6, 1991 (56 FR 45824), inviting public comments for 30 days, modifying the "salary basis" rules affecting eligibility for exemption under section 13(a)(1) of FLSA for employees in the public sector only. The Department issued the IFR to allow State and local governments to continue their public-accountability pay systems without incurring liability for overtime pay under FLSA to employees who would otherwise be exempt from the overtime pay requirements. A new § 541.5d was added to the regulations to provide that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave for partial-day absences for personal reasons or due to illness or injury and, when leave is not used or is exhausted, reduces the employee's pay for such absences of less than one full work-day, will not be disqualified from exemption due to such pay system. The rule also provided that the exemption would not be defeated by deductions from salary caused by budget-required furloughs that are not regular and recurring, except in the workweek in which a deduction occurs. The Department left all other aspects of the salary test unchanged, as well as the duties and responsibilities tests of the exemption, as applied to employees in the public sector.

The Department also published a Notice of Proposed Rulemaking (NPRM) on the same day (56 FR 45828; September 6, 1991), inviting public comment for 30 days on a separate proposal at 29 CFR 541.118(a)(6)(ii) to allow public sector employers with pay systems as specified in the IFR, under which past deductions were made in the pay of otherwise exempt public employees for absences of less than one work-day for personal reasons or due to sickness or injury, to reimburse the employees for those deductions that occurred before the IFR went into effect and thereby restore the employees' eligibility for exemption. The regulatory proposal also provided that the "salary basis" component of the exemption would not be disallowed under such pay systems where no actual deductions were made before the IFR went into effect. Upon review of the comments submitted on the NPRM, the Department is withdrawing the proposal from further consideration and it will not be implemented as a final rule. See, published elsewhere in today's Federal Register, a document that withdraws this NPRM. The Department will be proposing a legislative remedy to address such retroactive liability.

[The comment period was extended and USDOL received 398 comments and numerous other comments beyond the scope of the proposed 29 C.F.R. § 541.5d.] Several comments were also received suggesting revisions or review of other aspects of Regulations, 29 CFR part 541, including its application to the private sector. Some private sector commenters have suggested that modern compensation practices, especially those adopted to provide increased flexibility in the workplace and to reduce artificial distinctions among classes of employees, have made the salary basis test anachronistic.

The Department is currently reviewing these comments, as well as those received in response to the 1985 ANPR, in order to determine what further rulemaking proceedings may be appropriate with regard to these and the other issues raised.

With regard to the public sector, which is the subject of this rulemaking, it is clear to the Department, after review of all of the comments, that certain aspects of the "salary basis" test for distinguishing exempt from nonexempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Department's view, these aspects are not valid indicators of the bona fides of a claimed exemption...in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, the Department is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

The major comments received on the current rulemaking are summarized below, together with a discussion of the significant changes that have been made in the final regulatory text in response to the comments received. A number of comments were submitted that focused on issues in the regulations on which the Department had not proposed changes or invited public comment, which the Department will not be addressing at this time. However, to the extent appropriate, the Department will consider these views in the

context of its overall review of the full range of issues being considered in connection with the Department's November 1985 ANPR and February 1992 Request for Information.

III. Summary of Major Comments

....

Comment: Clarify the applicability of the remaining elements of the "salary basis" test.

Several commenters [said] that it was not clear that public employers continued to remain subject to all other aspects of the "salary basis" test in the regulations, stating that some public employers have attempted to argue in pending lawsuits that the Department's interim final rule completely eliminated all aspects of the "salary basis" test in the public sector.

The Department's interim final rule did not eliminate altogether the "salary basis" test in the public sector. A public sector employer must still be able to demonstrate that a claimed exempt employee satisfies all other aspects of the "salary basis" requirements for exemption. The interim final rule states specifically that to be exempt under the new exception an employee must be one "* * * who otherwise meets the requirements of § 541.118 * * *," the regulation which defines payment on a salary basis. .... Only partial-day deductions from pay when leave was not used or was exhausted and furlough-required deductions were addressed by the interim final rule. All other aspects of the salary test were left unchanged for the public sector, as these commenters pointed out.

Comment: The method used by the Department of Labor to consider and issue the rules was unfair and improper.

....

It had become apparent to the Department, as a result of court decisions in private litigation and the communications it

received, that the previously existing rules and enforcement policy were inadequate for effectuating the statutory exemption in the public sector. The availability of the exemption to public employers was increasingly sharply limited, contrary to the expressed intent of Congress in the 1974 Amendments. Public sector employers were accordingly being confronted with unexpected liabilities in very substantial amounts for employees considered exempt by their employers, and who assertedly would have been exempt but for the public accountability pay systems established well before extension of the Act to public sector employees. Because such awards could threaten State and local governments' fiscal integrity, the Department determined it was appropriate to change the "salary basis" rule on an interim basis so as to forestall additional liability while comments were received and considered in the process of developing and promulgating any final rule.

Comment: It is inappropriate to apply the section 13(a)(1) exemption for public sector employers differently than for private sector employers.

A number of commenters...suggested that there is no basis for the Department to distinguish between the private and public sectors under the section 13(a)(1) exemption. Some of these commenters pointed to the 1985 FLSA Amendments as clear evidence that the lack of attention to this issue by Congress in those Amendments reflected a specific Congressional intent not to distinguish between these two types of employment for purposes of applying section 13(a)(1) of the Act. Another commenter...stated that the 1974 FLSA Amendments demonstrate that Congress intended to extend the same, equal protection to

employees in the public and private sectors. One other commenter...suggested that the Department could have encouraged public employers to alter their policies concerning deductions of less than a day or that less drastic remedial measures could have been taken, such as altering the regulations to require that an actual deduction of pay occur before the exemption is lost.

The regulations defining the section 13(a)(1) exemption, largely in their present form, were adopted long before Congress extended the rights and protections of the FLSA to employees in the public sector.[11] Thus, the practice of docking public employees' pay for partial-day absences when paid leave was not available was not initially a concern in the administration of section 13(a)(1) of the FLSA.

Significantly, the existing regulatory requirements were adopted following public hearings in the 1940's and 1950's, which included evidence from witnesses showing that bona fide executive, administrative, and professional employees in the industries at that time subject to the FLSA were almost universally paid on a salary basis. These fact-based inquiries, conducted before the public sector became subject to the FLSA, did not include an examination of prevailing governmental pay practices. The historical record based on contemporaneous evidence also indicated that employees who did not meet the salary test generally also did not meet the other requirements of the exemption. The opposite is true with respect to the Department's current rulemaking, which was intended to address prevailing public sector pay systems operating

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[11]The general requirement that an exempt employee be paid "on a salary basis" has been an integral part of the regulations since 1940, and 29 CFR 541 118 ("salary basis") has remained essentially unchanged since revisions were last made in 1954.

under statute, ordinance, regulation, or other established public policy requiring all employees, including otherwise-exempt managers and executives, to use accrued leave time or incur a reduction in pay for any absences from work.

When FLSA coverage was extended to include public sector employees, separate provisions were not added to the regulations to define the section 13(a)(1) exemption in a manner that would distinguish public from private sector employment.

However, it is clear from a plain reading of FLSA's legislative history in 1974...that Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

The fact that public sector employers had pay systems that prevent them from paying employees for part-day absences when paid leave

is not available, and thus could invalidate the exemption for all employees "subject to" such pay systems under the principles set forth in Abshire, was not generally recognized to be the problem it is today when the 1985 Amendments were enacted. The 1985 legislation's silence on this issue is not indicative, in the Department's view, of an intent to make the section 13(a)(1) exemption unavailable to public sector employers because of the nature of their pay systems.

Congress expressly authorized the Secretary of Labor to prescribe the requirements for exemption under section 13(a)(1) of the Act.... Had Congress felt that the Department should not be free to revisit and revise its regulations in the future based on its enforcement experiences, it would have amended the statute to remove the Secretary's discretion.... The Congress has not made such a change throughout the history of the Act despite the numerous opportunities by the Congress over the years to amend section 13(a)(1).

Furthermore, the regulations promulgated immediately after enactment of the FLSA to implement section 13(a)(1) of the Act contained a section entitled "Petition for amendment of regulations" which provided, in part, that:

> (I)n determining * * * future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

This provision has remained a part of the regulations throughout their history. See 29 CFR 541.6 (1991). The Department has always had authority under these regulations to consider separate treatment of the public sector.

In light of the court decisions and representations by affected parties, the Department has determined that strictly

applying all aspects of the salary basis rule to the public sector...has produced results that do not effectuate the intended purposes of the Act. The Department considers it inconsistent with Congressional intent and inappropriate that the exemption be denied in the public sector to virtually all employees solely because their pay is subject to deduction for partial day absences where paid leave is not used, pursuant to pay systems that were established according to principles of public accountability, and, in some cases, imposed by law, ordinance or regulation, even before Congress extended the Act's coverage to the public sector. As a result, the Department has determined that these specific elements of the "salary basis" test are not valid indicators in the public sector of the bona fides of a claimed exemption under section 13(a)(1), and the revisions herein are necessary in order to give effect to the statutory exemption in the public sector as intended by Congress under the 1974 Amendments.

It is important to note that public pay systems, in many cases, are the result of requirements in State constitutions and statutes, civil service systems, city charters and ordinances, or regulations. Even if it were procedurally possible to change personnel policies through amendments to constitutions and charters and the repeal of all applicable laws and ordinances, it appears to the Department that the changes in public policy and tradition required for governments to conform to the Department's salary basis requirements, as interpreted by the Abshire court, are not consistent with the public accountability principles supported and required by the public. Thus, with respect to AFSCME's suggestion that the regulations could have been revised to require an actual deduction in pay for the

exemption to be lost, principles of public accountability embodied in the need to be accountable to the taxpayers for the expenditure of public funds only for hours actually worked require that the exemption criteria for the public sector take into account the fact that the pay systems at issue reduce pay for partial-day absences when leave is exhausted. As initially expressed in the preamble of the IFR, the Department's understanding that public sector employers necessarily must be held to a higher standard of accountability regarding the use of public funds in paying public employees was confirmed by the comments received during the rulemaking process. Consequently, to limit the rule to disallowing exemption in those workweeks that pay is reduced for absences not covered by available paid leave, as suggested, would simply not be responsive and would result in a rule that remains inadequate for appropriately distinguishing exempt from non-exempt employees in the public sector.

....

Comment: The "salary basis" test should be deleted for public sector employees.

Four commenters...suggested that the "salary basis" test should be deleted altogether, or made inapplicable as in Senate Bill S. 1670, ...102nd Cong., 1st Sess., or replaced with a minimum salary level, increased from present levels, above which the "salary basis" test would not apply.

The Department's IFR was narrowly drafted in response to a demonstrated need to specifically address the particular fact that the existing "salary basis" test in the regulations produced inappropriate results when applied to public sector compensation systems which, based on principles of public accountability, reduce pay for partial-day absences for personal reasons

or due to sickness or injury when leave is not used. All other requirements of the salary test were left unchanged as applied to employees in the public sector. Sufficient justification has not been shown in the comments to warrant eliminating altogether the "salary basis" requirement or making it inapplicable to public sector employees paid above some minimum "upset" salary level.

....

Comment: § 541.118(a)(5) regarding deductions for penalties imposed for infractions of safety rules of major significance should be broadened to include disciplinary suspensions of public sector employees.

Several commenters...stated that disciplinary situations are unique in the public sector, particularly in organizations like police departments, or different from those of the private sector because public employers have less freedom to terminate employees absent extraordinary circumstances and thus must use disciplinary suspensions without pay to rehabilitate or control behavior; that public employers have virtually no other penalty options; and that suspension for a full week, which can be done without jeopardizing exempt status, is rarely imposed because of its severity. One commenter...suggested that disciplinary systems promulgated by statute, ordinance, administrative order, standard procedure, or collective bargaining should be treated in the same manner as the new regulation treats deductions for partial-day absences. One commenter...noted that such disciplinary systems were in place at the time of the Garcia decision and are premised on the concept that public employers should be accountable to the taxpayers for the conduct of public employees. Another commenter...stated that failure to allow

disciplinary deductions in the case of exempt employees could result in inconsistent application of discipline among exempt and non-exempt employees.

In the Department's judgment, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule. Although contrary assertions were made, the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector.

Section 541.118(a)(5) was not open for comment during the present rulemaking. However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

....

Comment: The phrase "* * * established by statute, ordinance, regulation or public policy * * *" should be deleted or clarified.

....

The purpose of the phrase in question was to enable public sector employers to operate pay systems based on principles of public accountability without incurring unanticipated overtime liabilities to employees who would otherwise be exempt but for the practice of docking pay for partial-day absences when leave was not used. However, it is the Department's

view that the relief contemplated by the rule should only be available where the policy or practice of docking pay when leave is not used is based on principles of public accountability, as the record demonstrates is generally the case. Public accountability is a broad concept that forms the foundation for many governmental administrative practices, including most public sector pay systems, and is derived from the desires of taxpayers that their government be accountable to them for expenditures from the public treasuries. Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective and efficient use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain, including the view that public employees should not be paid for time they do not work that is not otherwise guaranteed to them under the pertinent civil service employment agreement (such as personal or sick leave), and the public interest does not tolerate wasteful and abusive excesses such as padded payrolls or "phantom" employees. In response to the comments received, the Department is clarifying in the final rule what was intended by "public policy" by substituting the phrase "policy or practice established pursuant to principles of public accountability."

....

OTHER USDOL PRONOUNCEMENTS

H. Weiss, Report and Recommendations on Proposed Revisions of Regulations, Part 541 24-26 (USDOL1949) (the Weiss Report) states, in relevant part:

....

The notice of hearing invited evidence on the need for revision or definition of the term "on a salary * * * basis." .... The evidence at hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executuve, administrative or professional status.

A number of questions have arisen in the past in connection with the interpretation of the phrase "on a salary * * * basis" particularly with respect to the effect of deductions on the salaried status of an employee. The problem became of some importance during the war when the practice of making such deductions was adopted by some companies engaged in war production as a disciplinary measure to discourage absenteeism among executive and adminsitrative employees. This practice raised serious questions as to whether any employees to whom it was applied were actually employed "on a salary * * * basis" in accordance with the provisions of the regulations. Investigation by the Divisions indicated that this changed practice had become sufficiently widespread to warrant the conclusion that the wartime industrial practice differed from the pre-war practice and that such disciplinary deductions were no longer inconsistent with payment "on a salary * * * basis." In an effort

to meet the wartime problems and to clarify the meaning of the term "on a salary * * * basis" the Divisions issued a restatement of position, the pertinent portion of which follows:

> ....[T]he fact that less than [an exempt's employee's predetermined amount] is paid for a particular pay period because disciplinary deductions are made for unreasonable absences would not in itself prove that the employee is not employed on a salary basis. [Nonetheless, exempt employes must be given more latitude in taking absences than non-exempt employees.]

As a result of this statement of position, the problems created by the pecluliar wartime conditions in many plants were solved but as an incident thereof, numerous administrative difficulties were encountered. For example, employers as well as the Divisions were faced with the need for determining in particular cases whether absences were reasonable or unreasonable and whether unreasonable absences included absences for longer periods than were allowed under established company plans for sick leave and "annual" leave. Since the answer to this latter question was determined to depend upon the reasonableness of the particular leave plan, employers had to decide for themselves and the Divisions in many instances were compelled to rule on specific leave plans to determine whether the leave plans were "reasonable" in nature. Employers were thus subject to considerable uncertainty prior to obtaining the opinion of the Divisions and the Divisions were faced with an undesirable administrative burden given such opinions. In my opinion, moreover,

the building of such an elaborate structure of interpretation upon the simple phrase "on a salary * * * basis" should be avoided if possible in the interests of good administration.

The testimony at the hearings indicated that the practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries had been a wartime phenomenon, resulting from rapid upgrading, the pressure of long hours, and other temporary conditions. Such deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary. There appears to be no present need for a definition of "salary basis" as difficult to apply as the one now followed by the Divisions, particularly since it is not consistent with the common understanding of the phrase as it applies to bona fide executive, administrative, and professional employees. In view of the changed conditions, payment of anything less than the full salary seemd to cast doubt upon the bona fide character of the employee's executive, administrative, and professional status.

....

USDOL Letter Ruling for March 29, 1991 (Fair Labor Standards Handbook, pp. 301-302, App. III (Thompson Publishing Group, Inc. 8/91) states, in relevant part:

....

You state that your client is a hospital [which] does not make deductions from [RNs'] salaries for absences of less than one day in accordance with section 541.118 of the regulations. However, the [applicable collective bargaining agreement] permits suspensions without pay from one to five days should the

RNs violate the hospital's of the State's rules governing health care employees. These rules address concerns of patient well-being, safety and job performance. The rules require safe and competent performance of assigned duties as well as prompt and regular attendance when the RNs are scheduled for work.

Q. 1. May the hospital suspend a RN for disciplinary reasons without pay for one full week notwithstanding payment of a salary on a biweekly basis without affecting the employee's exempt status?

A. 1. .... An employee may qualify as a bona fide professional employee if all the pertinent tests relating to duties, responsibility, and salary, as discussed in section 541.3 of the regulations, are met....

Section 541.118(a) states, in part, that an employee need not be paid for any workweek in which he or she performs no work. Therefore, the answer to your first question is in the affirmative.

Q. 2. May the hospital suspend an Rn for period sof less than one week but for one or more days without affecting the employee's exempt status?

A. 2. .... The only disciplinary type of deduction permissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance." As explained in section 541.118(a)(5), safety rules of major significance embrace those intended to prevent serious danger to the workplace or to other employees, including smoking in explosive plants, oil refineries, and coal mines. This has also been construed to cover industrial security

regulations promulgated by a government agency.

Disciplinary deductions made from the salary of an RN for violating rules relating to patient well-being and job performance are not the type of deductions that would be permitted.... There is not enough information [to determine whether safety rules of major significance are implicated.]

(3)

Supreme Court, U.S.
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No. 95-586

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN, ET AL., PETITIONERS

v.

GERALD R. MUELLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Regulations promulgated by the Secretary of Labor, 29 C.F.R. 541.5d and 541.118(a) and (a)(5), specify that employees are not considered to be paid on a "salary basis," and hence are not "professionals" exempt from the overtime compensation requirements of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, if their pay is subject to deductions of less than a full week's compensation for disciplinary violations (except violations of major safety rules). The question presented is:

Whether the disciplinary deduction rule of the Secretary's salary basis regulation is invalid insofar as it applies to a state employer.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-586

STATE OF WISCONSIN, ET AL., PETITIONERS

v.

GERALD R. MUELLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 54 F.3d 438. The opinion of the district court (Pet. App. 11-41) is reported at 858 F. Supp. 885.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1995. A petition for rehearing was denied on July 12, 1995. Pet. App. 9-10. The petition for a writ of certiorari was filed on October 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1), requires employers to pay their employees overtime compensation at a "rate not less than one and one-half times the regular rate" for hours worked in excess of 40 per week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from this requirement for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

Regulations promulgated by the Secretary provide that, in order to be a "bona fide * * * professional," an employee must perform primarily professional duties, 29 C.F.R. 541.3(a)-(d) (emphasis omitted) (defining "professional" employees),[1] and must be paid on a "salary * * * basis," 29 C.F.R. 541.3(e), at a salary of at least the specified level. See also 29 C.F.R. 541.1 (defining "executive" employees), 541.2 (defining "administrative" employees). Employees generally are not considered to be paid on a "salary basis," and thus are not bona fide professionals, if they are paid hourly or piecework wages rather than a salary. See 29 C.F.R. 541.3(e) (bona fide professional employees), 541.2(e)(1) (administrative employees), 541.1(f) (executive employees).[2]

Employees are, however, considered to be paid on a salary basis if they regularly receive a predetermined amount of compensation on a weekly (or less frequent basis) that "is not subject to reduction because of

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[1] The duties component of the regulations is not at issue in this case. See Pet. App. 26.

[2] Professional and administrative employees may be paid on a fee basis. See 29 C.F.R. 541.2(e)(1), 541.3(e).

variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). As a general rule, employees are categorized as "salary basis" only if they receive their "full salary for any week in which [they] perform[] any work without regard to the number of days or hours worked." *Ibid.*[3] The regulations allow employers to make deductions from an exempt salaried employee's predetermined compensation to reflect absences of "a day or more" for personal reasons other than sickness or accident, 29 C.F.R. 541.118(a)(2), or to reflect absences for "a day or more" due to sickness or disability if "made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability," 29 C.F.R. 541.118(a)(3). But if an employee's pay may be deducted to reflect absences of less than a full day, that employee is not considered to be paid on a salary basis.

In addition, under 29 C.F.R. 541.118(a)(5) an employer may impose penalties for infractions of safety rules of major significance without affecting an employee's salaried/exempt status. Employees subject to penalties for other infractions resulting in reduction of their weekly salary in any workweek in which any work is performed are not classified as "salaried." See 29 C.F.R. 541.118(a). Thus, employees are not paid on a salary basis if they are subject to unpaid disciplinary suspensions of less than a week's duration as a penalty for infraction of a work rule other than a major safety rule. See *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 285 (7th Cir. 1993).

b. In 1974, long after the salary basis regulations had first been promulgated, Congress extended coverage of the

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[3] Employees need not be paid for any workweek in which they perform no work. 29 C.F.R. 541.118(a).

FLSA to virtually all public sector employees.[4] In 1976, this Court ruled that the FLSA's minimum wage and overtime provisions could not constitutionally be applied to state employees engaged in traditional governmental activities. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Approximately ten years later, *National League of Cities* was overruled. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-547 (1985). In response to *Garcia*, Congress amended the FLSA to address particular concerns of state and local governments and to allow them relief from liability during a temporary adjustment period. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787. These amendments did not affect the Section 13(a)(1) overtime compensation exemption or the Department's salary basis regulations, and the Department of Labor's implementing regulations expressly made the Part 541 regulations applicable to state and local governments. 29 C.F.R. 553.32(c).

After a period of regulatory review and in light of the FLSA enforcement experience after 1985, the Department of Labor modified the "salary basis" test for public employers. In January 1987, the Department issued an enforcement policy under which the Wage and Hour Administration generally would not deny a Section 13(a)(1) exemption for an otherwise exempt public employee whose pay was reduced for absences of less than a day, if such reductions were required by state or local law.[5] See 57

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[4] In 1966, Congress had earlier extended FLSA coverage to limited categories of state employees: those employed in certain hospitals, institutions, and schools, and in the operation of certain railways or carriers. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830.

[5] The enforcement policy was not intended to affect any employee's rights under Section 16(b) of the Act, 29 U.S.C. 216(b)

Fed. Reg. 37,668 (1992) (quoting policy). In September 1991, the Department issued an interim final rule providing that public employees could qualify as exempt under Section 13(a)(1) of the Act even if they are subject to pay deductions for absences for periods of less than a day due to personal reasons, illness, or injury when no leave is available. 56 Fed. Reg. 45,824-45,826 (1991).[6] In August 1992, after notice and comment, the Department issued a final regulation, 29 C.F.R. 541.5d, permitting public employees who otherwise meet the salary basis test to be subject to such deductions for partial-day absences "according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability."

In issuing this new regulation, the Secretary noted that when the salary basis regulations were first promulgated in the 1940s, evidence showed that professional, executive, and administrative employees in the private sector were nearly always paid on a salary basis. 57 Fed. Reg. 37,666-37,668 (1992). Public employers, however, are normally subject to "principles of public accountability" that prohibit paying employees for time not worked. See *id.* at 37,667. Holding public employers subject to the traditional salary basis rule regarding the deduction of pay for

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(authorizing private suits for enforcement of the Act's wage requirements). *Ibid.*

[6] This interim rule became effective immediately without notice and comment because the Department had become aware that many public employers were, for reasons of public accountability, not permitted to compensate their employees for time during which no work was being performed, and that as a result public employers were exposed to "potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined." 56 Fed. Reg. 45,825 (1991).

partial-day absences, the Secretary recognized, could generally prevent state and local governments from availing themselves of the overtime pay exemption for professional, administrative, and executive employees, *ibid.*, despite Congress's intent, in extending the FLSA to state and local employers, that such employees in the public sector be exempt. *Id.* at 37,672. Thus, because he determined that the partial-day absence regulation enacted before Congress extended the FLSA to state and local government employers was not efficaciously "distinguish[ing] exempt from non-exempt public employees," the Secretary exempted such employees from that rule. *Ibid.*

At the same time, however, the Department retained the disciplinary deduction rule contained in 29 C.F.R. 541.118(a). 57 Fed. Reg. 37,674 (1992). The Department concluded that the comments it had received had not provided "a sufficient basis" for determining "that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers." *Ibid.* The Department noted that both public and private employers had disciplinary options wholly consistent with the Section 13(a)(1) overtime pay exemption, such as termination, official reprimands, demotions, and reassignment or restriction of duties. *Ibid.*

2. Petitioners are the State of Wisconsin and various Wisconsin state officials and agencies. The private respondents are a class of present and former engineers employed by petitioners whom petitioners classify as exempt from the overtime compensation requirements of the FLSA. Pet. App. 12.

For each biweekly pay period, petitioners paid each individual respondent a predetermined amount that was generally not subject to reductions because of the quantity and the quality of the work performed; in

addition, respondents received straight time (rather than time-and-a-half) overtime pay for work beyond 40 hours per week. Pet. App. 14-15. Respondents have, however, been required to use accrued compensated leave for personal absences of less than a day. *Id.* at 15. In addition, respondents have been subject to unpaid disciplinary suspensions of less than one week for infractions of work rules other than major safety rules, and petitioners have in fact assessed such penalties against employees. *Id.* at 16-17.

3. Respondents filed this suit alleging that petitioners violated the FLSA by failing to pay them required overtime compensation from December 3, 1989, forward. Pet. App. 12. Respondents asserted that they were not bona fide professionals exempted by Section 13(a)(1) of the Act, because petitioners required them to use accrued leave time for personal absences of less than a day, and because petitioners imposed disciplinary sanctions in the form of deductions of less than a week's pay. *Ibid.* Respondents also named the Department of Labor and the Secretary of Labor as defendants, alleging that they had unlawfully promulgated 29 C.F.R. 541.5d, which, as discussed above, provides public employers with an exception to the partial-day deduction portion of the salary basis test. Respondents sought a declaratory judgment that the regulation was invalid. Petitioners contended that the salary basis regulations do not apply to state employees. The federal respondents contended that the regulations as drafted properly apply to petitioners.

4. On cross motions for summary judgment filed by all the parties, the district court directed judgment against the respondents.[7] Pet. App. 41. The court first rejected

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[7] As respondents note (Resp. Br. 1-2), petitioners inaccurately characterize several legal conclusions as "undisputed" "factual

respondents' contention that the Secretary had exceeded his authority in promulgating 29 C.F.R. 541.5d, which modified the salary basis test for public employers. The court noted that where Congress has delegated to an agency the power to define statutory terms, as it did here, the court must accept any reasonable exercise by the agency of its delegated power. Pet. App. 22. The court upheld the Department's rationale for modifying the salary basis regulation, *i.e.*, that if the Section 13(a)(1) regulations were to serve as a shorthand method of identifying administrative, executive, and professional employees in the public sector, they had to accommodate the need of state and local governments to be accountable to the public in their pay practices. Pet. App. 22-26. The court also held that, even as to the period prior to the promulgation of 29 C.F.R. 541.5d for which respondents sought overtime compensation (*i.e.*, 1989-1991), petitioners' practice of requiring deductions from employees' accumulated leave (rather than from compensation) to reflect partial-day absences did not run afoul of the salary basis test. Pet. App. 26-30.[8] See 57 Fed. Reg. 37,676 (Aug. 19, 1992) (stating Department's position that employers

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findings." See Pet. 3-5. These include, for example, issues of congressional intent. Pet. 4 ("The district court *found* Congress could never have intended to apply any part of the salary basis test to public employers.") (emphasis added).

[8] The court concluded in the alternative that even if petitioners' partial-day absence policies ran afoul of the old regulation's salary basis test, Congress could not have intended state and local governments to choose between the obligation to remain accountable to the public and their ability to make use of the FLSA's Section 13(a)(1) exemption. Thus, a regulation denying "exempt" status to state and local governmental employees subject to compensation deductions for partial-day absences would, in the court's view, be invalid. Pet. App. 30.

can require employees to substitute paid leave for absences of less than a day without losing the exemption).

The district court also held that 29 C.F.R. 541.118(a)'s disciplinary deduction rule could not validly be applied to state government employees. Pet. App. 30-39. Pointing to the Department's recognition when it promulgated 29 C.F.R. 541.5d that the partial-day absence rule was unduly restrictive when applied to the public sector, the court believed that the same rationale showed that Congress must not have intended for state and local governments to comply with the disciplinary deduction rule. Pet. App. 33. The court decided that petitioners' disciplinary practices, like partial-day absence policies, were based on principles of public accountability. See *id.* at 35. Skeptical of the availability of other disciplinary options, the court concluded, without reference to supporting evidence, that state and local governments "lack [this] kind of disciplinary flexibility." *Ibid.* Thus, in the court's view, application of the disciplinary deduction rule to state or local governments also conflicted with Congress's intent to afford public sector employers the same opportunities for FLSA exemptions as private employers. The court therefore concluded that 29 C.F.R. 541.118(a)(5) is invalid as applied to the public sector. Pet. App. 34-36.

In support of its decision, the district court invoked the canon that statutes are to be construed, where possible, to avoid serious constitutional questions. The court believed that applying the disciplinary deduction component of the salary basis test to the administrative, professional, and executive employees of state and local governments would raise a serious question under the Guarantee Clause of the Constitution. Art. IV, § 4. The court believed that the Guarantee Clause "supplies the substantive content [that] the Tenth Amendment lacks" by securing to each State " 'the autonomy necessary to maintain a republican form

of government' and by providing an 'essential constitutional limit on federal interference with state autonomy.'" Pet. App. 37 (quoting Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 22-23 (1988)).

The court reasoned that "when congressional action upsets the usual constitutional balance of state and federal powers, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." Pet. App. 38 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)). The court believed that Congress was "thinking primarily in terms of minimum wage requirements and never considered the effect" of salary basis regulations on public pay systems. *Ibid.* Thus, in the court's view, it was inappropriate to interpret the FLSA to require application of the disciplinary deduction component of the salary basis test to public employers. *Ibid.*

The district court also believed that nothing in the salary basis test is essential to an effective extension of the FLSA to government workers.[9] Because the salary basis test is "only a tool for implementing the FLSA, not a part of the substantive law of the FLSA," the court found it all the more unlikely that Congress intended the existing salary basis test to apply to state and local government employers when it extended the FLSA to apply to those entities. Pet. App. 39.

5. The court of appeals reversed and remanded. Pet. App. 1-8. The court noted that petitioners could prevail in

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[9] In support of its assertion, the court noted that the Office of Personnel Management, which administers the FLSA as it applies to most employees of the federal government, categorizes employees as exempt from the Act based on their grade level and position classification. Pet. App. 38-39.

this case "only if the current regulation, which is to say 29 C.F.R. § 541.118 as amended by 29 C.F.R. § 541.5d," validly exempted public employers from the partial-day absence rule but should have extended the exemption to include the disciplinary deduction rule. *Id.* at 5. The court held that the "regulation is valid, period." *Ibid.* Because it was conceded that petitioners "did not comply fully" with the regulation, the court concluded that petitioners are liable to the private respondents. *Ibid.*

In upholding the regulation, the court noted that when Congress explicitly delegates to an agency responsibility for implementing a statutory scheme by defining key terms, as it has done with the Section 13(a)(1) exemption, judicial review is limited to determining whether the agency's action is rationally related to the objectives of the statute containing the delegation. Pet. App. 5. The court ruled that 29 C.F.R. 541.5d "easily passe[s]" that test. *Ibid.* Under principles of "public accountability," the court reasoned, public employees must account for every hour away from work, either by using accrued leave or by sacrificing a pro rata portion of their salary, even though from a functional standpoint they are executive, administrative, or professional employees. Pet. App. 6. In light of this public accountability principle, the effect of the original salary basis regulation was, the court observed, "to bring under the Act [public] workers who in no realistic sense were hourly-wage employees." *Ibid.* Thus, the Secretary's regulation relieving public employees from the general rule against deductions for partial-day absences was rationally related to the objectives of the Act. *Ibid.*[10]

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[10] The court of appeals did not address the district court's ruling that petitioners' policy of docking accrued leave for partial-day absences was permissible under the salary basis test as it stood before

The court of appeals also held that the Department acted reasonably in deciding not to create an exception for public employers from the disciplinary deduction component of the salary basis test. Pet. App. 6-7. While that aspect of the Department's regulation "reduces the employer's disciplinary flexibility," the court of appeals stated, "[n]either the principle of public accountability, nor any other principle of public administration * * * makes it imperative that public employers have th[e] power" to dock executive, administrative, and professional employees less than a full week's pay as a disciplinary measure. *Ibid.*

The court further ruled that because the Secretary's disciplinary deduction rule does not prevent States from bringing functionally executive, administrative, and professional employees within the Section 13(a)(1) exemption, the suggestion that subjecting States to the rule would violate the Guarantee Clause of the Constitution was meritless. Pet. App. 7. Indeed, the court saw no significant relation between the Guarantee Clause and "the employment of engineers." *Ibid.*[11] Thus, the court upheld the Department's decision not to carve out a public employer exception to the disciplinary deduction component of the salary basis test. *Id.* at 8.[12] Because

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29 C.F.R. 541.5d (or the earlier interim final rule) was promulgated. The court of appeals did not need to reach that issue because, as discussed *infra*, it ruled that petitioners' policies ran afoul of the disciplinary deduction component of the test, which was in effect before (as well as after) the changes in the partial-day absence provisions.

[11] Because the Guarantee Clause was inapplicable, the court had no occasion to "speculate on whether the Supreme Court continues to believe that the clause does not create any legally enforceable rights." Pet. App. 7.

[12] The court expressed skepticism about the apparent rationale for the disciplinary deduction rule—namely, that if an employer metes out

petitioners concededly did not comply with the disciplinary deduction regulation, *id.* at 5, 31, the court ruled that the employee respondents were not exempt from the FLSA. *Id.* at 31.[13]

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court. Nor, as petitioners concede (Pet. 10), does it create a direct conflict with any other court of appeals decision. Further review is therefore unwarranted.

1. Petitioners contend that the Department has contravened congressional intent by applying to a state employer the disciplinary deduction component of the salary basis test, 29 C.F.R. 541.118(a) and (a)(5), which implements the FLSA exemption for executive, administrative, and professional employees. See 29 U.S.C.

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discipline in the form of fractions of an employee's weekly salary, the employee is really being paid on an hourly basis. Pet. App. 8. Petitioners, however, were not challenging the rationality of the disciplinary rule "in toto," but rather were challenging the Department's refusal to create a public employer exception to the general rule. *Ibid.* The court rejected that challenge because petitioners had not shown sufficient need for greater disciplinary flexibility than private employers.

[13] The court also dismissed a cross-appeal by the Department of Labor, which had sought review of the district court's ruling that the disciplinary deduction rule was invalid as applied to state and local governments. See Pet. App. 3-4. The court of appeals concluded that the Department could not maintain an appeal because there was no judgment entered against it and the Department was thus not seeking to have a judgment of the district court modified in any way. *Id.* at 3. Although its appeal was dismissed, the Department was an appellee in the court of appeals because it was defending the district court's grant of summary judgment in its favor. As a party to the court of appeals proceeding, the Department is a proper respondent in this Court. See Sup. Ct. R. 12.6.

213(a)(1). The Secretary, however, has been provided broad authority to "define[] and delimit[] from time to time by regulations * * * subject to the provisions of [the Administrative Procedure Act]" who shall be considered an "executive," "administrative," or "professional" employee.[14] *Ibid.* Thus, the Secretary's regulations setting forth such definitions and delimitations must be upheld so long as they are not arbitrary, capricious, or manifestly contrary to the Act.[15] See, *e.g.*, *Sullivan* v. *Zebley*, 493

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[14] Hence petitioners' assertion that the Department has "ma[de] major policy decisions *beyond its authority*" (Pet. 16) (emphasis added) is false; there has been no usurpation here.

[15] Petitioners contend without supporting argument (Pet. 15) that the Department's disciplinary deduction standard is a "non-regulatory interpretation" not entitled to full *Chevron* deference. Perhaps petitioners mean to attach significance to the fact that 29 C.F.R. 541.118 is contained in the "interpretations" subpart of Part 541, rather than the "regulations" subpart. Such an inference would be misguided. First, 29 C.F.R. 541.5d, which indisputably is a "regulation," makes clear that public employers must comply with 29 C.F.R. 541.118. Second, there is every reason to accord full deference to 29 C.F.R. 541.118 standing alone. Although labeled an "interpretation," the provision, like 29 C.F.R. 541.5d, was promulgated pursuant to notice and comment rulemaking in accordance with the congressional authorization of Section 13(a)(1). See 19 Fed. Reg. 1321-1322 (1954); see also *Avery* v. *City of Talladega, Ala.*, 24 F.3d 1337, 1340 (11th Cir. 1994) (holding *Chevron* deference applicable to 29 C.F.R. 541.118); 57 Fed. Reg. 37,666 (1992) (Secretary's salary basis regulations of 1940 and 1954 "were developed from extensive hearings and record evidence"). In any event, petitioners have demonstrated no reason to believe that applying the lesser standard of deference of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), as they maintain is appropriate (Pet. 15), would lead to a different outcome in this case. See *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 285 (7th Cir. 1993) (upholding 29 C.F.R. 541.118(a)(5) as applied to private employer under *Skidmore* deference). Cf. *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060, 1070-1072, 1078 (1st Cir. 1995) (upholding interpretations of learned professional and journalism exemptions under *Skidmore*

U.S. 521, 528 (1990); *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977).

a. For more than 50 years the Secretary's regulations have provided that an employee must be paid on a salary basis to come within the Section 13(a)(1) exemption. See 5 Fed. Reg. 4077 (1940). And for more than 40 years, the regulations have explicitly stated the disciplinary deduction rule challenged in this case. See 19 Fed. Reg. 4405 (1954). Petitioners below did not contest the reasonableness of the disciplinary deduction rule in general;[16] they challenged it only as applied to state and local government employers. Their certiorari petition in this Court likewise is limited to questioning whether application of the rule to state and local governments is

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standard); *Reich* v. *New York*, 3 F.3d 581, 587 (2d Cir. 1993) (upholding interpretation of administrative exemption under *Skidmore* standard), cert. denied, 114 S. Ct. 1187 (1994).

[16] The courts have upheld the reasonableness of a salary basis requirement for the Section 13(a)(1) exemption. See, *e.g.*, *Walling* v. *Yeakley*, 140 F.2d 830, 832-833 (10th Cir. 1944) ("[I]n most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation [of bona fide executive, administrative, and professional employees]."); see also *Martin* v. *Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2d Cir. 1991) (denying executive exemption because employees were not paid on salary basis), cert. denied, 113 S. Ct. 298 (1992); *Tripp* v. *May*, 189 F.2d 198 (7th Cir. 1951) (denying administrative exemption because employee was not paid on salary basis). Although the court of appeals here questioned the rationale underlying the disciplinary deduction component of the salary basis requirement, this rule is a part of a reasonable scheme in which deductions from an employee's weekly paycheck based on the quantity and quality of work are generally deemed inconsistent with exempt status, see pp. 2-6, *supra*, subject to certain exceptions (such as penalties for major safety violations). Indeed, the Seventh Circuit has previously upheld the disciplinary deduction rule in the context of a private employer. *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 285 (7th Cir. 1993).

consistent with congressional intent. See Pet. App. 8; see also Pet. i (limiting question presented to whether Congress intended disciplinary deduction rule to apply to state employers).

Contrary to the conclusion of the district court, and to the assertions of petitioners (see Pet. 24), the Department's exemption of public employers from another element of the salary basis test—the partial-day absence rule, see 29 C.F.R. 541.5d—does not establish that the Department acted unreasonably in deciding not to differentiate between public and private employers with respect to the disciplinary deduction rule. As the court of appeals held, there is an obvious basis for the Department's decision to omit the partial-day absence rule from the salary basis requirement applicable to public employers, while retaining the disciplinary deduction rule. The Secretary determined that principles of public accountability, which require governments to be accountable to taxpayers for expenditure of public funds, often prohibit public employers from paying employees for time not worked, and that applying the partial-day absence rule to such employers would inappropriately prevent them from availing themselves of the Section 13(a)(1) exemption for executive, administrative, and professional employees.

By contrast, public accountability principles do not require public employers to impose particular forms of discipline, such as unpaid suspensions of less than a week for minor infractions, and such employers have a range of other options for implementing discipline that would allow them to preserve the exception, should they so desire, for particular classes of employees. Pet. App. 7; 57 Fed. Reg. 37,677 (1992); *Jackson* v. *Kentucky*, 892 F. Supp. 923, 933 (E.D. Ky. 1995) ("[N]o compelling public policy reasons make the disciplinary prong of the salary [basis] test more problematic for public employers than for large-scale

private employers."), appeal docketed, Nos. 95-6283 and 95-6284 (6th Cir. Sept. 27, 1995); accord *Meringolo* v. *City of New York*, No. 91 Civ. 7755 (KTD), 1995 WL 702348, at *8 (S.D.N.Y. Nov. 28, 1995); *McCloskey* v. *Triborough Bridge & Tunnel Auth.*, 903 F. Supp. 558, 567 (S.D.N.Y. 1995); *Pautlitz* v. *City of Naperville*, 781 F. Supp. 1368, 1372 n.8 (N.D. Ill. 1992).[17]

b. Reasonableness aside, petitioners argue that Congress intended affirmatively to prohibit the Secretary from implementing the Section 13(a)(1) exemption with the same disciplinary deduction rule for state and public employers that he applies to private employers. Petitioners, however, point to nothing in the text or legislative history of the FLSA's extension to state and local government employers that even remotely suggests such congressional intent.[18] The absence of any such indication is particularly telling because the applicable regulations were promulgated prior to Congress's extension of the FLSA to state and local employees. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982) (Congress presumed aware of published regulations when it extends a statute).

In 1974, Congress specifically addressed the question of exemptions for public employers. In amending the FLSA

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[17] The court of appeals concluded that petitioners had demonstrated no need to impose employee suspensions without pay of less than a week's time. Pet. App. 6-7.

[18] The Department's response to comments received during the 1992 rulemaking does not support petitioners' claim (Pet. 10) that the Department "admitt[ed] * * * that using its salary basis test against public employers had been contrary to the intent of Congress." Rather, the Department's response makes clear that it determined that the partial-day deduction component of the salary basis rule was "unduly restrictive when applied in the public sector," Pet. App. 102, and that exemption from that aspect of the salary basis rule was appropriate.

Congress exempted from overtime requirements certain categories of state and local government employees, such as elected officials, their personal staff, and certain of their appointees and advisers. See 29 U.S.C. 203(e)(2)(C). Moreover, after this Court's decision in *Garcia*, Congress in 1985 considered "the particular needs and circumstances of the States and their political subdivisions" and "respond[ed] to these concerns by adjusting certain FLSA principles with respect to employees of [those entities] and by deferring the effective date of certain provisions of the FLSA insofar as they apply" to them. S. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985); see Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787. The 1985 amendments did not, however, modify either Section 13(a)(1) or the salary basis test in the Secretary's implementing regulations; thus, nothing in the amendments reflects an intent to restrict the Secretary's authority to define and delimit the scope of the 13(a)(1) exemption.[19] See 29 C.F.R. 553.32(c). In light of the careful consideration Congress gave to the extension of the FLSA to state and local government employees, and to the needs of state and local governments upon the renewal of coverage occasioned by *Garcia*, petitioners' position—that Congress specifically intended to prohibit the Secretary from applying the disciplinary deduction component of the salary basis test to state and local government employers—is without merit.

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[19] The 1985 amendments contain special provisions for governmental employers on subjects such as compensatory time in lieu of overtime, special details, and volunteers. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-4, 99 Stat. 787-790. The Amendments also added an exemption for employees of the legislative branch of States and their political subdivisions. § 5, 99 Stat. 790.

2. In the absence of any support in the FLSA's text or legislative history, petitioners argue that because application of the disciplinary deduction rule to state and local governments assertedly raises a substantial constitutional question (Pet. 15), and because the rule is not applied to determine whether federal employees fall within the Section 13(a)(1) exemption (Pet. 17), Congress should be presumed to have intended to foreclose the Secretary from applying the disciplinary deduction rule to state and local employers. Neither of those contentions has merit.

a. Invoking the Tenth Amendment (Pet. 26), petitioners contend (Pet. 9) that the court of appeals' ruling "undermines the delicate balance between * * * federal and State sovereignties protected by a web of constitutional provisions." Yet, as petitioners concede (Pet. 25), this Court has rejected the position that application of the FLSA to state and local employers violates the Tenth Amendment. *Garcia* holds that "nothing in the overtime and minimum-wage requirements of the FLSA, as applied to [a state and local transit authority], * * * is destructive of state sovereignty or violative of any constitutional provision"; such a public employer, the Court reasoned, "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, [must] meet." 469 U.S. at 554. Moreover, as petitioners recognize (Pet. 25), "*Garcia* held that detecting the line between mandates to States permissible under the commerce clause and impermissible under the Tenth Amendment should be left to the political process." See 469 U.S. at 551-554.[20]

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[20] *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), does not support petitioners' position, as they seem to suggest. See Pet. 25. *Lopez* held that certain activity did not substantially affect interstate commerce

Petitioners are similarly misguided in contending that the disciplinary deduction rule raises a substantial question under Art. IV, § 4, of the Constitution, which guarantees to each State a republican form of government. Even if the Guarantee Clause creates any legally enforceable rights,[21] its relationship to "the employment of engineers is," as the court below put it, "obscure." Pet. App. 7. Indeed, the law review article on which the district court relied in holding that petitioners' Guarantee Clause claim raised a substantial constitutional question, see Pet. App. 37-38, does not support the proposition that application of the FLSA to respondents raises such a question. While the article does argue that the Clause "bar[s] Congress from regulating the wages of state governors, legislators, judges, and other employees who exercise the powers of republican government"—many of whom are generally exempt from the FLSA, see 29 U.S.C. 203(e)(2)(C)—it recognizes that the Clause has no implications for federal legislation affecting the wages of "[s]chool teachers, hospital orderlies, garbage collectors, bus drivers, and air traffic controllers," who, like respondents here, "do not exercise the lawmaking, adjudicatory, or enforcement functions that characterize a republican government." See D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 56 (1988).

Even if the Guarantee Clause were read to afford some measure of judicially enforceable protection to petitioners'

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and thus that Congress lacked authority under the Commerce Clause, Art. I, § 8, cl. 3, to regulate it. Petitioners have not contended that their wage practices do not affect interstate commerce for Commerce Clause purposes.

[21] Claims under the Guarantee Clause have been held to be nonjusticiable. *Baker* v. *Carr*, 369 U.S. 186, 224-226 (1962); see also *City of Rome* v. *United States*, 446 U.S. 156, 182 n.17 (1980).

interest in disciplining its engineers, it is difficult to see how the Secretary's disciplinary deduction rule impermissibly impinges on such an interest. See Pet. 13. The disciplinary deduction rule does not prohibit petitioners from imposing suspensions of less than a week for reasons other than violation of major safety regulations; it provides only that employees subject to such suspensions are not deemed to be exempt salaried employees for purposes of the FLSA. Moreover, as the Department has concluded, petitioners may use a host of other disciplinary measures and at the same time retain the Section 13(a)(1) exception. 57 Fed. Reg. 37,677 (1992); see also Pet. App 7 ("[A]ll the states have to do is to delete this form of discipline from their arsenals of disciplinary remedies.").[22]

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[22] The disciplinary deduction rule does not run afoul of any constitutional restriction on federal mandates to the States. In *New York* v. *United States*, 505 U.S. 144, 188 (1992), this Court held that the federal government may not compel the States to enact laws to administer a federal program. The decision specifically distinguished cases "in which Congress has subjected a State to the same legislation applicable to private parties"—including *Garcia*, in which this Court approved the FLSA's coverage of state employers. *Id.* at 160.

Although this Court took Guarantee Clause considerations into account in interpreting the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), that case is clearly distinguishable. There, the Court was faced with the particularly sensitive question of whether general federal employment legislation overrode a state constitutional provision defining the basic qualifications of state judges. Noting that the qualifications involved a "decision of the most fundamental sort for a sovereign entity," the Court declined to find that the federal statute covered state judges absent a "plain statement" to that effect. *Id.* at 460-461, 467. *Gregory* is inapposite to this case, because discipline of state engineers does not go to such core sovereignty concerns, and because the FLSA, its Section 13(a)(1) exemption, and the relevant regulations (29 C.F.R. 541.5d and 541.118) were intended to cover state employees. Cf. *Reich*

Petitioners' further suggestion (Pet. 19) that adherence to the disciplinary deduction rule would cause them to commit equal protection violations is without merit. Adherence to the FLSA scheme is a rational basis for petitioners' action in imposing different types of discipline on different categories of employees, and thus petitioners would have a defense to an equal protection claim were they to apply different penalty schemes to "exempt" and "non-exempt" employees.[23] See *Jackson* v. *Kentucky*, 892 F. Supp. at 935; see also Pet. 19 (recognizing that petitioners need only supply a rational basis for differential discipline). Moreover, as we have noted, nothing in the statute or regulations *requires* different disciplinary policies; petitioners are free to use or to forgo suspensions of less than one week as to any of their employees. The disciplinary deduction rule merely holds petitioners accountable for payment of overtime compensation to employees who are not salaried.

b. Petitioners also contend that because the exempt status of federal employees is determined without regard to a salary basis test (or disciplinary deduction rule),

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v. *New York*, 3 F.3d at 589-590 (*Gregory*'s plain statement rule does not apply because requirement that State pay overtime compensation to criminal investigator does not strike at heart of representative government and, in any event, FLSA clearly applies to state law enforcement agency), cert. denied, 114 S. Ct. 1187 (1994); *Biggs* v. *Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993), cert. denied, 114 S. Ct. 902 (1994).

[23] Equally without merit is petitioners' argument (Pet. 19) that should the classes of exempt and non-exempt employees "happen to differ by sex or race," differential treatment of exempt and non-exempt employees would require strict scrutiny. As petitioners apparently recognize (see *ibid.* (quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979))), disproportionate impact, as in the speculative scenario posited by petitioners, cannot, absent proof of discriminatory purpose, establish an equal protection violation. *Washington* v. *Davis*, 426 U.S. 229 (1976).

Congress must have intended to prohibit the Secretary from concluding that such a test was appropriate for state and local employers. This argument also lacks merit.

When Congress extended coverage of the FLSA in 1974 to federal employees, administration of the Act with regard to most federal employment was placed in the Civil Service Commission, now the Office of Personnel Management (OPM). 29 U.S.C. 204(f); 5 C.F.R. 551.101(a). Pursuant to that authority, OPM has issued regulations under which agencies are to determine whether employees are exempt. 5 C.F.R. 551.204 (executive), 551.205 (administrative), 551.206 (professional). Although grade classifications play a role in the criteria for exemption, see *e.g.*, 5 C.F.R. 551.203(a) and (b); 551.205(d), the regulations do not include a salary basis test as set forth in the Department's regulations.

Petitioners, however, point to nothing in the FLSA or its legislative history that suggests that Congress intended OPM's actions or regulations governing the federal sector to circumscribe the Secretary of Labor's explicit statutory authority under Section 13(a)(1) with regard to those employers who fall within the Secretary's enforcement authority. Rather, the Secretary is to construe Section 13(a)(1) as he determines is appropriate in light of the conditions he ascertains among the entities that fall within his regulatory jurisdiction.[24] The legislative history of the 1974 Amendments does show that "Congress intended OPM to have a great deal of authority to determine how the FLSA would be administered in the civil service." *American Fed'n of Gov't Employees* v. *OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987) (*AFGE*). However,

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[24] Because OPM has jurisdiction only over federal employees, not state and local ones, it has not expressed a "view * * * that no salary requirement applies to the public sector." Pet. 14.

Congress's decision to vest in OPM authority for carrying out the distinct task of meshing two federal statutory schemes—the civil service laws and the FLSA—to apply them to *federal* employees does not detract from the Secretary's authority to implement a single federal statute, the FLSA, for *nonfederal* employees. See *AFGE*, 821 F.2d at 769.

3. Petitioners contend that there is an "indirect conflict" between the decision below and the Ninth Circuit's decision in *Service Employees International Union, Local 102* v. *County of San Diego*, 60 F.3d 1346 (1995), petition for cert. pending, No. 95-724 (filed Nov. 6, 1995). As their assertion of a mere "indirect" conflict suggests, there is no direct conflict warranting this Court's review.

In *Service Employees Union*, the court of appeals ruled that the Department's entire salary basis test, as it existed before the interim final regulation of September 6, 1991, was invalid as to public employers. The court's focus, however, was not on the disciplinary deduction rule, which is the basis of petitioners' liability in this case, but solely on the tension between the partial-day absence rule and the principle of public accountability. See 60 F.3d at 1352-1353. Because of that tension, the court concluded that application of the salary basis test as it then stood to state and local employers was inconsistent with Congress's intent to make the Section 13(a)(1) exemption available to public employers, because public accountability principles required such employers to deduct pay for time not worked.[25] *Ibid.*

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[25] As the Secretary explained in his amicus brief in support of the petition for rehearing and suggestion of rehearing en banc in *Service Employees Union*, he disagrees with the Ninth Circuit's conclusion that the partial-day absence rule was invalid as applied to public sector

As petitioners concede,[25] the Ninth Circuit did not discuss whether the disciplinary deduction rule was consistent with congressional intent. Moreover, the court of appeals' decision relied on what it viewed as the Secretary's corrective action in promulgating 29 C.F.R. 541.5d, which exempts States from complying with the partial-day absence rule, yet at the same time requires their adherence to the longstanding disciplinary deduction rule as a condition for benefiting from that exemption. 60 F.3d at 1353 ("The 1992 regulation *properly* amends the salary test as applied to the public sector, so that the salary test now takes into account longstanding and reasonable state and local ordinances predicated on public accountability.") (emphasis added). Thus, nothing in the reasoning of the *Service Employees Union* case conflicts with the holding of the court of appeals here that the disciplinary deduction rule as applied to state and local

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employers before the interim final regulation was promulgated in 1991. The Secretary maintains that, even though he modified the regulations in 1991, the pre-1991 scheme, including the partial-day absence rule, was permissible implementation of Section 13(a)(1), which explicitly charges him with defining the qualifications employees must have to be exempt. 29 U.S.C. 213(a)(1) (exemption applies "as [its] terms are defined and delimited *from time to time*" by the Secretary) (emphasis supplied); *Kinney* v. *District of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993) (Secretary's statements in preamble to 29 C.F.R. 541.5d do not indicate that Secretary viewed his preexisting regulation as void ab initio, but rather that Secretary was formulating new regulatory principles for public sector employers). In any event, this case raises no issue concerning the validity of the partial-day absence rule prior to 1991, because petitioners' liability is predicated on the disciplinary deduction rule, which is included in both the pre- and post-1991 versions of the salary basis test.

[25] See Pet. 11 n.2 ("Appl[ication of] the disciplinary deduction standard in the public sector was also not involved [in *Service Employees Union*].").

governments is a reasonable exercise of the Secretary's regulatory authority.[27]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[27] Moreover, the statement in *Service Employee Union* that the "entire" salary basis test (as it stood before September 1991) was invalid as applied to public sector employers is clearly misguided. For example, as a part of its reasoning that the regulation was invalid *in toto*, the court of appeals expressed the view that the Department's 1987 "nonenforcement policy covered the entire salary test, not just part of it"; for that reason, the court believed, "essentially *no* valid salary test applicable to the pubic sector existed until the [Department] finally conducted rulemaking in 1991 and 1992." 60 F.3d at 1354. That statement, however, is plainly wrong, inasmuch as the Department's nonenforcement policy related *only* to the partial-day absence rule. See p.4 & n.5, *supra*. Thus the *Service Employees Union* court erred in concluding that the Department's nonenforcement policy supported the conclusion that no aspect of the pre-1991 salary basis test could be applied to public sector employees.

Supreme Court, U.S.
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No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

REPLY, AND ADDITIONAL APPENDIX, AS TO BRIEFS OPPOSING PETITION FOR WRIT OF CERTIORARI

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REPLY AS TO QUESTION PRESENTED

Focusing on Congressional intent, Wisconsin framed the "Question Presented." Petition, p. i; S.Ct.Rule 14.1(a). Diverting attention from Congressional intent, the Engineers and USDOL each propound an alternative Question. To avoid analyzing the disciplinary deduction standard, part of the salary basis test, they each call that test a "regulation" promulgated under legislative rule-making authority. The test is not a regulation (App. 66-69, 75-76, 118-120; USDOL brief, p. 15, n.15) and does not merit the deference granted by the court of appeals and requested by the respondents.

The Engineers claim USDOL scrutinized the rationale of the test repeatedly and recently. USDOL has not, for forty years, examined if the test is rational. App. 83-84, 90, 95-96, 99, 102-103, 111. USDOL has, for the past ten years, consigned to an "overall review" all questions about the rationality of its FLSA exemption criteria, has expressly refused, in adopting 29 C.F.R. § 541.5d, to contemplate if the test makes any sense and continues to postpone deadlines for thinking about rationality. *Id.*; App. 85-86, 120-145.

Even if the test were rational, the appellate court should be reversed if USDOL has no rationale for the disciplinary deduction standard or for applying it to public employers. A 1949 report said disciplinary deductions should be barred. Petition, pp. 7-8 and 9-10, n.1; App. 72-73, 110-111 and 112-115. USDOL, publishing the salary basis test later in 1949, barred no disciplinary deductions. App. 118-120. Its first proposal for a standard in the test, in 1954, allowed suspensions for "major disciplinary reasons." App. 72-73. Citing unspecified "comments", the final version allowed only safety-related suspensions. App. 73. USDOL never published a rationale for the standard much less enunciated any reason to apply it to the modern

workplace or public sector. Petition, pp. 7-8 and 9-10, n.1; App. 72-73, 85-86, 110-111, 112-115, 118-120, 121-145.

Absent USDOL rationale, the court of appeals conjured a possible reason for the standard, that imposing full day suspensions except in full workweek increments somehow implies an hourly status, but acknowledged even that reason was "pretty feeble." App. 7-8. States, sovereign entities when the Constitution was formed, are forced to choose between unconstitutional options not because Congress intended that result but due to gross federal agency neglect compounded by appellate court abdication. The Garcia hypothesis that State powers would be protected by political processes, tested through party and ideological changes in the Presidency and Congress, ignored these variables and been proven wrong.

REPLY AS TO LIST OF PARTIES

Wisconsin agrees that Ronald J. Strak, not Richard E. Stark, is among the unnamed plaintiffs. Engineers' brief, p. ii; App. 45.

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to the Seventh Circuit Court of Appeals

REPLY, AND ADDITIONAL APPENDIX, AS TO BRIEFS OPPOSING PETITION FOR WRIT OF CERTIORARI

REPLY AS TO STATEMENT OF THE CASE

A. Assertions by Wisconsin.

Respondents challenge Wisconsin labelling, as "undisputed", findings the district court included in "UNDISPUTED FACTS." App. 14-18. They claim the district court's findings contained legal conclusions.

1. Consequences of differentiating discipline based on exempt status.

The Engineers want this Court to believe there are disputes about whether Wisconsin

> Differentiating discipline between employes because they are exempt and nonexempt would undermine the validity of the discipline, violate Wisconsin's labor relations laws, create dissension and morale problems among its work force and violate its employees' state and federal constitutional rights.

Engineers brief, p. 2, n.1 quoting Petition, pp. 3-4. The district court found this was among the "UNDISPUTED FACTS." App. 16. If certiorari is granted, the record will show (a) Wisconsin proposed detailed facts underlying this finding through the district court's summary judgment procedures,[1] (b) Respondents conceded the facts underlying this finding and (c) undisputed record evidence supported the finding. Dkt. No. 129 (Wisconsin PFOF 55-59 citing Dkt. No. 185 (Litscher aff., ¶¶ 9-17)). The court of appeals did not "reverse" the finding that differentiating discipline based on exempt status would have the consequences noted. It instead

> recognize[d] that a higher percentage of public rather than private employees have tenure and that it is difficult (quite apart from the rather silly constitutional bar to firing a tenured public employee without giving him due process of law) to fire a

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[1]The appellate court approves these procedures. Tatalovich v. City of Superior, 904 F.2d 1135, 1137 (7th Cir. 1990).

public employee; and this makes alternative sanctions more important.

App. 7. The court of appeals reversed because it perceived no "crippling blow to effective public administration" in the consequences which indisputably result from differentiating discipline practices based on exempt status and because it thought only a cursory glance at the disciplinary deduction standard was warranted. App. 6-8.

The Engineers are so intent on avoiding this undisputed finding on consequences, they cite a factual document not in the record, an E-Mail message sent within a defendant agency after the appellate mandate (Resp. App. 7a), to argue Wisconsin believes no impacts result from differentiating discipline based on exempt status. Engineer brief, p. 20. More than one agency is involved. Since July 1995, **all** Wisconsin agencies have been directed, pending resolution here, to avoid suspending exempt employes contrary to the standard.

The evidence actually demonstrates the untenable choices the court of appeals required Wisconsin to make. If Wisconsin had stayed silent about whether it would allow its exempt employes to be suspended contrary to the standard, it would have left itself exposed to immense FLSA liability. Klein v. Rush-Presbyterian-St. Luke's, 990 F.2d 279, 286 (7th Cir. 1993) (to lose exempt status "it is enough that a deduction could have been made for an impermissible reason"); Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995) (no actual deduction needed since "it is enough that one could have been made"). Wisconsin officials entrusted with tax revenues collected from its citizens, hoping this Court would both accept certiorari and reverse the court of appeals, could have gambled with guaranteed loss of exemptions for tens of thousands of Wisconsin employes and with high risks of doubling back pay and substantially enlarging liability periods as to any exempt Wisconsin employes who might

make claims. 29 U.S.C. §§ 216(b) and 260. Choosing that course, it would be hard to argue against liquidated damages and findings of wilful violation. *Id.* That gamble would have been unwise for any government required to account to its citizens.

Though Wisconsin was wise to direct its agencies, pending resolution here, to discipline employes differently based on exempt status, that does not diminish the serious consequences of making those distinctions. App. 16. Instead the court of appeals decision forced Wisconsin -- to avoid paying overtime compensation to its tens of thousands of executive, professional and administrative employes and to minimize the massive amount of Wisconsin tax revenues FLSA damages may absorb -- to "undermine the validity" of "discipline" imposed on various employes, "violate Wisconsin's labor relations laws, create dissension and morale problems among its work force and violate its employees' state and federal constitutional rights." App. 16.

If individual employes prevail in challenging these disparities, because exempt status has no rational connection to disparities in discipline, Wisconsin citizens will likely hold Wisconsin, not the federal government, accountable for those adverse results. Wisconsin must inflict substantial harm on its citizens no matter which choice it makes. With either choice, its ability to account to its own citizens is substantially diminished. Faced with untenable choices which should not have been imposed, Wisconsin chose a temporary solution which, it hopes, creates the least net harm to its citizens.

2. **Scope of "undisputed" facts.**

USDOL claims Wisconsin labelled district court findings on congressional intent at App. 26-39 "undisputed." Wisconsin instead labelled as "undisputed" only those findings reproduced at App. 14-18. Petition,

p. 3. Just as Wisconsin did not concede the validity of appellate court findings it reported (Petition, p. 5), Wisconsin did not intend to assert the findings on congressional intent reproduced at App. 26-39 were accepted by all parties (Petition, pp. 4-5).

3. Congressional intent.

USDOL says that when district courts determine if its interpretations, such as the salary basis test, comport with congressional intent (App. 26-39) the courts make legal conclusions rather than factual findings. District court analyses of interpretations in 29 C.F.R. Part 541, Subpart B, being "fact-based", can be not only properly characterized as findings but actually entitled to deference. *E.g.*, Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1072 (1st Cir. 1995) cited by USDOL for other holdings (USDOL brief, p. 15, n.15); Martin v. Cooper Electric Supply Co., 940 F.2d 896, 900 (3rd Cir. 1991); Dalheim v. KDFW-TV, 918 F.2d 1220, 1225-26 (5th Cir. 1990). The court of appeals here, rather than deferring to district court findings on whether the USDOL interpretations comported with Congressional intent, deferred to the USDOL interpretations. App. 5-8.

B. Additional assertions by respondents.

The Engineers and USDOL erroneously characterize additional assertions as facts. A few examples are noted.

1. Claim that decision not based on possible suspensions.

The Engineers claim the appellate decision was grounded on actual suspensions rather than on contingent possibilities that suspensions contrary to the disciplinary

deduction standard could be received. Engineers brief, pp. 2 and 3, n.2. They claim multiple suspensions contrary to the standard were actually imposed on various members of the plaintiff class. *Id.* This is untrue. During the liability period, one plaintiff, David Russell, was suspended by his employer agency contrary to the standard. Petition, p. 4 citing App. 16 and 31. A potential suspension of another employe, Terry Cook, depended on the outcome of a grievance proceeding. App. 16 and 31. If loss of exemption turned on a plaintiff actually receiving a suspension contrary to the standard, rather than a contingent possibility that the plaintiff would receive such a suspension (App. 2), the appellate court would have affirmed summary judgment either against all plaintiffs other than David Russell or against all plaintiffs not employed by Russell's employer agency. Instead it found exemptions were lost as to all plaintiffs and reversed summary judgment as to all plaintiffs and all defendant agencies. App. 5-8.

The court of appeals below denies exempt status if an employe "**could** have been" suspended contrary to the standard even if no contrary suspension actually occurs and even if such suspensions are merely possible. *E.g.*, Klein, 990 F.2d at 286; Bankston, 60 F.3d at 1253; emphasis added. *See* App. 2; USDOL brief, p. 3-4. The courts of appeal interpret this question in widely varying ways. Some interpret 29 C.F.R. § 541.118(5) to bar exempt status only if an actual policy **expressly** calls for contrary suspensions and not if such suspensions are merely a "contingent possibility." Auer v. Robbins, 65 F.3d 702, 710 (8th Cir. 1995), *petition for cert. pending*, No. 95-897; Barner v. City of Novato, 17 F.3d 1256, 1262 (9th Cir. 1994) (restricting prior holdings in Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991)); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 615 (2nd Cir. 1991), *cert. denied*, 113 S.Ct. 298 (1992); York v. City of Wichita Falls, 944 F.2d 236, 242 (5th Cir. 1991). Other courts interpret 29 C.F.R.

§ 541.118(5) as barring exempt status only if an actual suspension is received even though a policy expressly calls for contrary suspensions. *E.g.*, Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991).

The Seventh Circuit may stand alone in its draconian view of 29 C.F.R. § 541.118(5) which deprives employers of FLSA exemptions on a wholesale basis unless the option of suspending exempt employes contrary to the standard is completely surrendered. *E.g.*, Klein, 990 F.2d at 286; Bankston, 60 F.3d at 1253. Though State sovereignty is sacrificed under all of these appellate views, in the Seventh Circuit, the sacrifice is more transparent and egregious. State employers within the Seventh Circuit must do more than refrain from actual suspensions, and from adopting express policies allowing suspensions, contrary to the USDOL standard. They must declare formal unilateral surrender to USDOL, as Wisconsin has now done pending resolution here, by expressly stating obedience to all USDOL commands on disciplining FLSA-exempt employes no matter how disruptive to public accountability. *Id.* USDOL recognizes how dramatically divergent the circuits are in their interpretations of this USDOL "interpretation" App. 88-89, 97-98, 138-139 and 140. It refuses to clarify its scope. App. 120-145.

2. Claim that district court, without support, invalidated federal law rather than construe Congressional intent.

The Engineers state that the district court, without citation, "invalidate[d] federal **law** to accommodate . . . Wisconsin's disciplinary policies and practices." Engineers brief, p. 3; emphasis added. While the Engineers may disagree with how the district court construed

Congressional intent to assure federal law was implemented, no federal law was invalidated. App. 18-39. In contrast to the court of appeals analyses (App. 5-8), the district court analyses were not only littered with citations but demonstrate cogent and careful consideration of the cited authorities and the applicable legal principles. App. 18-39. Contending the district court's conclusions were unsupported by any citations, though puzzling, should not require further consideration. Finally, what is involved is not accommodation but whether Congress, acting only under its Commerce power, intended, or could have intended, to prohibit States from imposing otherwise proper discipline on its own employes.

3. Claim that Congress intended its 1985 amendments to be the only allowed variance in FLSA enforcement between the public and private sectors.

The Engineers lost, at both lower court levels, their claim that Congress allowed for no distinctions in how exemptions apply in the public and private sectors (App. 5-6, 22-26) and sought no review. Opposing Wisconsin's Petition, they resurrect the same arguments rejected by both lower courts. They assert the very limited accommodations Congress was asked to, and did, provide to the public sector in 1985 -- which had nothing to do with exemptions or any "salary" issues -- marked the boundaries of any differences Congress intended to exist between the public and private sectors. Engineers brief, pp. 4-5, Resp. App. 8a-9a. This is untrue. USDOL, in creating the very differences in exemption criteria the Engineers challenged, found the 1985 amendments only addressed "particular concerns," did not "affect" or "address" applying the exemptions to public employers and that "[n]either the statutory changes nor the

legislative history of the 1985 Amendments contain any significant references" to the exemptions or any USDOL pronouncement on the exemptions. App. 93-94. *See also* USDOL brief, pp. 19-20, n. 19. Congress intended exemption criteria to be different. App. 5-6, 22-26.

4. Claim that USDOL fully reconsidered the rationale of the salary basis test and the disciplinary deduction standard in its 1992 rulemaking.

The Engineers, to bolster their claim that USDOL fully reconsidered the rationale of the salary basis test in the 1992 rulemaking, cite the 1985 "advance notice of proposed rulemaking requesting the views of the public on **any changes they felt were necessary in 29 C.F.R. Part 541.** App. 83-84." Engineers brief, p. 7, highlighting in original. They then recite selected USDOL actions thereafter, with carefully edited quotes, leaving the impression USDOL had, during its 1992 rulemaking and otherwise, "taken many opportunities to reexamine the salary basis test." Engineers' brief, p. 10.

USDOL, as rulemaker, has declared repeatedly that it has **declined** many opportunities to reexamine the salary basis test. After USDOL, in 1985, allowed for comments on the rationality and workability of 29 C.F.R. Part 541 (App. 83-84), it has declared consideration of these issues completely off-limits in any other context (App. 84-85, 85-86, 90, 95-96, 99, 102-103, 111). This "overall review", which precludes any rethinking of underlying rationality or irrationality of any part of 29 C.F.R. Part 541 outside the "overall review" (App. 90, 99, 102-103, 111) keeps being deferred into the indefinite future (App. 121-145). Adopting 29 C.F.R. § 541.5d, USDOL expressly refused to think about rationality:

> A number of comments were submitted that focused on issues . . . on which [USDOL] had not proposed changes or invited public comment, which [USDOL] will not be addressing at this time. However, to the extent appropriate, [USDOL] will consider these views in . . . its overall review . . . .

App. 102-103. The Engineers quote statements USDOL made about the standard during this 1992 rulemaking only because some commentators were so impertinent as to ignore USDOL's self-imposed constraints. Engineers brief, p. 10. The Engineers omit the language immediately following these quoted statements:

> Section 541.118(a)(5) was **not** open for comment during the present rulemaking. However, [USDOL] expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

App. 111; emphasis added. Admitting their entire exemption structure is "sorely out of date" and fraught with "confusion" (App. 138-139 and 140), USDOL has continued to set no deadlines, or defer deadlines, for probing the rationality or irrationality of the salary basis test and its components. App. 85-86, 121-145.

USDOL claims, as an advocate, it "modified" the salary basis test for public employers based on regulatory review and enforcement experience, rather than a recognition it had misconstrued Congressional intent for decades, and that it "retained" the disciplinary deduction standard as part of a careful reconsideration. USDOL brief, pp. 4-7. It did neither. The best response to this astonishing claim is USDOL's own contrary statements as a rulemaker. App. 110-111, 121-145. If this reflects a

USDOL view that it need do no more in examining rationality, the situation is even more grave.[2]

5. Claim that Wisconsin is disingenuous in asserting non-safety suspensions except in full workweek increments are prohibited.

The Engineers accuse Wisconsin of being "disingenuous" in noting the disciplinary deduction standard prohibits all suspensions not based on major safety rule violations except in full workweek increments -- prohibiting, for example, workers with five-day workweeks from being suspended for 12 days, 21 days or any other period not divisible by five. USDOL, in its brief, also characterizes its prohibition as precluding only non-safety suspensions of less than one full workweek.

The standard precludes precisely what Wisconsin asserted. Assume a public worker is observed stealing public property on a Wednesday and admits the theft that day. If an employer imposes a 12 day suspension --

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[2]Kafka's parable comes to mind:

> Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment. . . ."

Kafka, "Before the Law", Franz Kafka: The Complete Stories 3-4 (Glatzer ed. 1972). The man remains, receiving sporadic hopes of entry at constantly retreating moments, until, when he dies, the door, having served its purpose, is closed. *Id.*

starting the next two days, Thursday and Friday, and for two weeks thereafter (partially to protect public property from further thefts) -- encompassing those two days violates the standard. Why? Because workweeks in which any work is performed are covered by the standard and the 12 day suspension involves one covered workweek. 29 C.F.R. § 541.118(a).

Under the standard, the public employer either would have to wait until the next Monday to start suspending the employe without pay or immediately suspend the employe -- who had just stolen from the public till -- and pay compensation, out of public funds, to an employe not at work because of theft. By contrast, the original intent of the FLSA was to assure: "'A fair day's pay for a fair day's work.'" Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942)

Wisconsin understands the difficulty the Engineers and USDOL have in squaring this nonsensical result with an "hourly/salaried" distinction. It is not disingenuous, however, to observe the actual results of the standard.

6. Claim that Wisconsin limited challenge to asserting the disciplinary deduction standard should apply only in the public sector.

The Engineers and USDOL say Wisconsin has asserted an otherwise valid disciplinary deduction standard should not apply in the public sector. While Wisconsin, both before the appellate court and in its Petition, directed its analyses primarily to the special circumstances facing the public sector, Wisconsin has challenged the validity of the salary requirement, the salary basis test and the disciplinary deduction test as applied to both the public and private sectors. It also

challenged the draconian loss of exemptions resulting from how the appellate court interprets the standard.

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

Congress never intended to exercise its commerce power to require States to impose discipline on their employes contrary to public accountability standards.

B. USDOL has not articulated a rationale for its disciplinary deduction standard, an outdated non-regulatory interpretation, or why Congress would apply that standard to public employers.

1. Through rulemaking, USDOL admitted there is no reason to apply the disciplinary deduction standard to public employers.

When 29 C.F.R. § 541.5d was adopted as a regulation in 1992, USDOL articulated no rationale to apply the disciplinary deduction standard to public employers and actually admitted, by implication, there was no rationale. Though USDOL refuses to acknowledge it, the regulation and its accompanying commentary made it clear salary should not be a criterion for exempt status for public employes. App. 59-60, 91-112. Though the connection between payment on a salary basis and the disciplinary deduction standard was already "pretty feeble" (App. 8), applying the standard in the public sector certainly can not be justified after this implied abandonment of a salary requirement in the public sector.

In 1992, USDOL finally recognized it comports with the intent of Congress in 1974 for a public employer to deduct pay for three hours from an eight hour day when an exempt public employe takes off three hours without permission. 29 C.F.R. § 541.5d(a)(1) (App. 59). Yet State and local employers lose all exemptions if they reserve the right to suspend workers for **full** workdays except in full workweek increments. If salary were a proper criterion, reason would suggest exactly the opposite conclusion: deductions for less than full workdays would threaten the exemption while deductions in full workday increments would not.

The truth is that, as with federal employes, pay on an salaried basis is not a proper exemption criterion at all. Petition, pp. 7-8, 10; App. 52-55, 76-82 (salary always consciously omitted as an exemption criterion for federal workers since inconsistent with proper principles of public administration). Though USDOL, as an advocate, argues the decision in Service Employees Int'l Union, Local 102 v. County of San Diego, 60 F.3d 1346, 1353 (9th Cir. 1995), *as amended on denial of rehearing, cert. denied*, No. 95-724 (1/16/95) -- which held that applying salary basis test to public employers "invalid in its entirety" (*id.* at 1353) -- was wrongly reasoned, with this Court having denied a writ of certiorari, it does become the law in the Ninth Circuit. USDOL, as a rulemaker, admitted in 1992 that the initial empirical rationale for a salary requirement, that employers said it was a "universal" way to pay exempt employes, is untrue in the public sector. Petition. p. 6; App. 92. *See also* Petition, p. 14, n.4 (federal government admitting few federal employes paid salary). Yet USDOL asserts the disciplinary deduction standard still applies.

The Engineers argue that USDOL articulated a rationale for imposing its disciplinary deduction standard on public employers. It never has. The court of appeals, on its own, conjured the "only answer" it could, "that if an

employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis", and characterized even its own reason as "pretty feeble". App. 7-8. The court of appeals failed to realize USDOL admitted Congress never intended to apply the salary requirement in the public sector. It also failed to realize that, even if a salary requirement applied, suspending employes for full workdays has nothing to do with whether the employe is paid on an hourly basis since the employe is being paid for full workdays without regard to the hours involved.

Rationales supporting either the disciplinary deduction standard or applying that standard to public sector employers must be expressly stated through rule-making. *E.g.*, Bowen v. Georgetown University Hospital, 488 U.S. 204, 212-13 (1988); Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co., 463 U.S. 29, 48-49 (1983). Courts decline to accept rationales articulated by appellate counsels for agencies other than rationales during rule-making. *E.g., id.* Rationales articulated by non-agency litigants or lower courts should also be unavailing. Requiring that rationales be expressly stated through rule-making must be strictly adhered to so an agency's purported ""*expertise*, the strength of modern governments, [does not] become a monster which rules with no practical limits on its discretion. [Citations omitted.]"" Motor Vehicle Manufacturers Ass'n, 463 U.S. at 48, italics in original.

USDOL, in a 1949 hearing report, said no discipline should be imposed on any exempt employe for two reasons: administrative convenience and few of the private employers then covered ever disciplined their exempt employes. App. 112-115. USDOL, creating the salary basis test at the end of 1949, included **no** disciplinary deduction standard. App. 118-120. This report containing the only enunciation of any rationale -- though for a disciplinary standard rejected in 1949 and

far different than the one adopted five years later -- should be examined. Even where constitutional issues are not involved, the Court is skeptical of agency rationales based on administrative convenience where the results of the chosen course, as here, are confusing and complex. *E.g.*, Cottage Savings Ass'n v. Commissioner, 499 U.S. 554, 565-66 (1991). A rationale assuming employers rarely discipline their executive, professional or administrative employes under any circumstances is so woefully outdated, if ever correct, the court of appeals did not even mention it in deciding against Wisconsin. App. 7-8. A cursory knowledge of employment law will confirm that, in the public and private sectors, executive, professional and administrative employes are frequently subjected to various types of discipline. The standard. Requiring pay for days in which no work is performed, is a far cry from the FLSA's original intent: "'A fair day's pay for a fair day's work.'" Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942).

No rationale was ever articulated by USDOL to apply its disciplinary deduction standard to public employers. Despite USDOL's efforts to keep anyone from talking about the irrationality of the disciplinary deduction standard, particularly as applied in the public sector, during the 1992 rulemaking process, some commentators had the gall to do so anyway. App. 110-111. For unspecified reasons, USDOL believed these uninvited commentators had not met an unstated burden of proof -- to show "public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers" -- and that public accountability problems could be ignored because public employers had "other options for disciplinary infractions." App. 111.

The court of appeals and respondents also argue that constitutional concerns under the Tenth Amendment and the Guarantee Clause (U.S. Const., Amend X and

Art. IV, § 4) may be dismissed because State employers have disciplinary "options" other than the prohibited suspensions. Presumably, USDOL could, with the same lack of rationality, decree that States were restricted to the "options" of reprimanding or discharging their employes. Constitutional concerns can not be so lightly dismissed. Can a government prohibit a demonstration protected by the First Amendment because the demonstrators have a printing press? Can blacks be barred from a white school because a black school also exists? Can a federal agency, under the Commerce power, require a State to surrender all means of disciplining its own employes other than reprimand and discharge? To say that "other options" exist is no answer to constitutional concerns.

2. The salary basis test, including the disciplinary deduction standard, is an "interpretation" rather than a "regulation".

Understandably, the Engineers want to view the test and standard in 29 C.F.R. § 541.118 as a "regulation" entitled to Chevron deference and not an "interpretation" governed by Skidmore analysis. If the Engineers label 29 C.F.R. § 541.118 a "regulation" a thousand times, it remains a non-regulatory agency interpretation.

"Regulations" appear in 29 C.F.R. Part 541, Subpart A. App. 75, 118-120. The test and standard are expressly characterized by USDOL, in 29 C.F.R. Part 541, Subpart B, as "Interpretations". App. 75-76; 118-120. The test describes its own contents as "interpretations". 29 C.F.R. § 541.118(6). While USDOL can issue "legislative rules" defining the meaning of the exemptions created by 29 U.S.C. § 213(a)(1), that authority is exercised only where USDOL declares it is doing so. *E.g.*, 1 Davis & Pierce, Administrative Law Treatise, § 6.3,

p. 24 (1994 ed.) citing Metropolitan School Dist. of Wayne v. Davila, 969 F.2d 485, 490 (7th Cir. 1992).

The Engineers are so intent on transforming the salary basis test into a "regulation" that they erroneously claim this Court, in Walling v. General Industries Co., 330 U.S. 545 (1947) "referr[ed] to the salary basis **test** as a regulation". Engineers' brief, p. 23; emphasis added. Walling did not refer to 29 C.F.R. § 541.118, first included in the Code of Federal Regulations two years later (App. 118-120), at all. 330 U.S. at 546-52. Instead Walling properly referred to 29 C.F.R. **§ 541.1** (*id.*), which contains the general salary requirement, as a regulation. App. 56-57. The test, by contrast, explains what payment on a salary basis means, the critical issue here, and is not part of those regulations. 29 C.F.R. § 541.118.[3]

The Engineers claim Skidmore analysis does not apply because the forms of nonregulatory USDOL interpretations involved in Skidmore were different. Engineers brief, p. 23, n.13. The Engineers ignore the court below, on the two preceding occasions it had analyzed 29 C.F.R. § 541.118, characterizing it as an agency interpretation governed by Skidmore analysis. Petition, pp. 15-16. Publication in the Federal Register or the Code of Federal Regulations do not make it a "regulation." *E.g.*, Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1070-72 (2nd Cir. 1995) (noting distinction between regulations in 29 C.F.R. Part 541, Subpart A and interpretations in 29 C.F.R. Part 541, Subpart B); Ritter v. Cecil County Office of Housing & Community Development, 33 F.3d 323, 328 (4th Cir. 1994); Headrick v. Rockwell International Corp., 24 F.3d 1272, 1281-82 (10th Cir. 1994) citing Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979) for distinction.

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[3]WestLaw ("541.118 or (salary /2 basis /2 test" in SCT and SCT-OLD files) discloses no decisions.

The Engineers, arguing Skidmore is outmoded and that non-regulatory interpretations are now entitled to Chevron deference, cite a concurring opinion of a single Justice in EEOC v. Arabian American Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring). Engineers brief, pp. 23, n. 14. They fail to note a majority of five Justices held to the contrary (499 U.S. at 257) and that the differing view Justice Scalia expressed confirms the majority did not accept his view (499 U.S. at 260 (Scalia, J. concurring).[4] The Engineers' reliance on Arabian American Oil is more curious since it was cited, in an FLSA decision adverse to USDOL, to refuse Chevron deference to nonregulatory USDOL interpretations and instead apply Skidmore analysis. Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1026 (10th Cir. 1993), *rehearing and rehearing en banc denied.* The Engineers also fail to cite the six-Justice majority, including Justice Scalia, in John Hancock Life Insurance v. Harris Bank, ___ U.S. ___, 114 S.Ct. 517, 529 and 531 (1993) confirming the continuing viability of the two different deference standards under Skidmore and Chevron. *See also* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991) (citing Skidmore and holding interpretative rules are not entitled to Chevron deference); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 463, n. 12 (1989).

Professor Davis analyzes the continuing vitality of the distinction and the importance of restricting Chevron deference to "legislative rules". 1 Davis & Pierce at § 6.3. He notes the Seventh Circuit has both misapplied the distinction and, in other cases, applied the distinction through "particularly clear and well-reasoned" analysis.

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[4]The Engineers fail to note Justice Scalia's most frequently cited comment in that opinion that "deference is not abdication." Arabian American Oil, 499 U.S. at 260 (Scalia, J., concurring).

Id. at pp. 246-47. The Seventh Circuit recently gave **no** deference to a non-legislative agency interpretation. Atchison, Topeka & Santa Fe Ry. v. Pena, 44 F.3d 437, 442 (7th Cir. 1994) (*en banc*), *cert. granted*, 115 S.Ct. 2575 (1995). The appellate courts appear confused about how to treat agency interpretations which are not legislative rules. *E.g.*, cases noted in Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170, 185, 192, n. 11 (3rd Cir. 1995) (Nygaard, J. dissenting).

The salary basis test is not entitled to Chevron deference but is instead governed by Skidmore analysis. Under that analysis -- requiring internal persuasiveness of reasoning -- the salary basis test, and the disciplinary deduction standard, fail miserably.

3. Applying the disciplinary deduction standard to public employers does not result from any regulation.

Applying the disciplinary deduction standard to public employers does not result from 29 C.F.R. § 541.5d or any other regulation. If the non-regulatory interpretation which is 29 C.F.R. § 541.118 and the commentary which precedes 29 C.F.R. § 541.5d in the Federal Register did not exist, there would be no provision of any sort precluding any employer from suspending their FLSA exempt workers in full day increments. 29 C.F.R. § 541.5d was limited to addressing the concern that caused it to be adopted -- whether it comported with Congressional intent for public employers to use their leave accounting systems as to exempt employes -- and the effect of the disciplinary deduction standard was simply not on USDOL's agenda at all. App. 59, 110-111.

The prior section noted that Skidmore analysis applies to 29 C.F.R. § 541.118, a non-regulatory

interpretation. Similarly commentary during a rule-making process is not a regulation and normally provides the "weakest support" for a litigant's position. Headrick, 24 F.3d at 1282. As with other USDOL rules, the commentary in the Federal Register was "added here by [USDOL] only to help clarify the meaning and application of the various promulgated rules that follow it. [Citations omitted.]" *Id.* That commentary is also governed by Skidmore analysis and not entitled to Chevron deference. *Id.*

C. The Founders assumed it was central to sovereignty that a government have the power to control its own workers through, among other means, suspensions and pay deductions.

Respondents assert it is not relevant to the republican forms of government Congress was to guarantee under U.S.Const., Art. IV, § 4 or to the States' reserved rights under the Tenth Amendment (U.S.Const., Amend X), whether a State government has the power to control their own employes through suspensions and pay deductions. The contemplation of such an assertion would have startled the Founders.

After decades of struggle to gain control over the officials who ran their colonial governments (Petition, pp. 20-23), the newly forged States assumed full exercise of the power to control their officials through suspensions and deductions from pay. In 1775, the Rhode Island Assembly "pushed the [Loyalist] executive out of the way by **suspending** him from office until, that fall, his seat was declared vacant, and the patriotic Deputy-Governor . . . installed in it." A. Nevins, The American States During and After the Revolution, 1775-1789 80 (1924); emphasis added. The new States each framed "Constitutions [which] made it clear that the civil officers

were instruments of the whole people: 'Magistrates are their trustees and servants, and at all times amenable to them', the Virginians put it." *Id.* at 165. In 1783, "[r]esolutions were passed [by New York] to penalize tax collectors for their delinquencies." E. Spaulding, New York in the Critical Period, 1783-1789 13 (1932).

Madison defined a republican form of government as one "administered by persons holding their offices during pleasure, for a limited period, or during good behavior." The Federalist, No. 39, p. 251 (Cooke ed. 1961). Madison expected the new national government, in determining the "tenure of the ministerial offices" to follow "the example" set by the States. *Id.* at p. 253.

An "example" set by the States to which Madison likely referred was the experience of his friend, Governor Thomas Jefferson, in Madison's Virginia, just a few years before the Constitutional Convention. Governor Jefferson analyzed which entity within the State, the Executive or the Assembly, "may remove officers of the line [i.e., military officers] or staff." "Notes concerning the Right of Removal from Office", 4 The Papers of Thomas Jefferson: 1 October 1780 to 24 February 1781 281-82 (J. Boyd, ed. 1951). The "question principally affects the Staff, whose rapacity, inattendance and means of evasion require energetic superintendence." *Id.* at 281. He concluded it implicated "Republican form and principles" for the State Executive to have power to remove Staff, if not military officers, and that, absent that power, the "[c]onsequences" would be grave:

> Cannot dismiss **nor suspend** the most pettifogging and rascally officer. Forage masters--waggon masters--gardeners--purveyors--nurses--expresses--waggoners--smiths--carpenters--mercantile agents--ambassadors--Directors general--surgeons--

surgeons mates--chaplains--Commissaries--Quartermasters--"

Id. at 282; emphasis added. Jefferson "became familiar with the 'rapacity, inattention and means of evasion' practised by forage masters, purveyors, &c., soon after becoming governor." *Id.* at 282, f/n.

After 1776, Maryland, to control "poor attendance" which "continued to plague the General Assembly" throughout the late 1700's, deducted daily pay from any legislator absent without excuse. C. Everstine, The General Assembly of Maryland, 1776-1850 33, 152-55 (1982). Similar to the suspensions the USDOL standard would now usurp from State authority, Maryland, before and as the Constitutional Convention was being held, made these daily pay deductions for unexcused absences to assure public business could be conducted. *Id.* at 152. *See id.* at 33, 153-54 for numerous actual deductions. This practice developed during the colonial period. C. Everstine, The General Assembly of Maryland, 1634-1776 40, 41, 60, 74, 357 (1980). *See also* J. Munroe, Colonial Delaware: A History 96 (1978).

By 1787, each government assumed the power to suspend and deduct pay as to their own public officers for unexcused absences and other violations of the public trust. *E.g.*, T. Tshudy, "Compilation of Qualifications and Charges and Punishments afforded Members of the Pennsylvania House of Representatives, 1682-1980" in Report on the History of Disciplinary Actions in the Pennsylvania House of Representatives (1980). Members were suspended by the Legislature for "not upholding the responsibilities of their position." *Id.* at 4. More than fifty legislators were fined before 1787 for unexcused absences or tardiness. *Id.* at 1-20. In 1755, unexcused absences were punished by members "forfeiting [their] whole wages during that sitting." *Id.* at 15.

Hamilton declared the importance of "promoting punctuality" in government. The Federalist, No. 75, p. 508 (Cooke ed. 1961). He also observed that "A POWER OVER A MAN'S SUBSISTENCE AMOUNTS TO A POWER OVER HIS WILL (The Federalist, No. 79, p. 531 (Cooke ed. 1961)) and that "[t]hose who pay are the masters of those who are paid" 1 M. Farrand, Debates of the Convention 373 (rev. ed 1937).

The Convention commenced with a motion for a rule to "provide agst. interruption of business by absence of members" which was adopted the following day. 1 Farrand 13, 15 and 17. The idea of penalizing public servants for unexcused absences was so central to the Founders' thinking it was expressly incorporated into the Constitution. U.S. Const., Art. I, § 5, cl. 1. "Each House" of Congress was "authorized to compel the Attendance of absent Members, in such manner, and **under such Penalties** as each House may provide." *Id.*; emphasis added. The Pinckney Plan authorized each house to "punish non attending members". 4 Farrand 40 (replacing 2 Farrand 140) and 4 Farrand 42 (replacing 2 Farrand 141). On August 10, 1787, Madison cosponsored the motion to add this provision to the Constitution. 1 Farrand 253-54. Without debate, it was "[a]greed to by all except Pena. which was divided." *Id.* The Senate's authority to "compel the attendance of its own members" was noted with approval during ratification debates in South Carolina. 3 Farrand 252. This Court, observing the penalties each house "is authorized to inflict in order to compel the attendance of absent members" may even include "imprisonment," appeared to recognize the power to decide the appropriate penalties unquestionably lay with the body itself. Kilbourn v. Thompson, 103 U.S. 168, 190 (1880), *criticized on other grds.*, Hutcheson v. United States, 369 U.S. 599, 613 (1962).

The Founders debated suspending impeached persons from their office. 2 Farrand 64-69, 612-13. In

July 1787, eight States approved and two States disapproved that proposal. 2 Farrand 69. The question arose again in the Convention's closing days with a motion that "persons impeached be suspended from their office until tried and acquitted." 2 Farrand 612. Madison opposed this proposal arguing the President was already too dependent on the Legislature, through its power to try an impeached President, and that an "intermediate suspension" would allow the Legislature to "make way for . . . another who will be more favorable to their views" by "vot[ing] a temporary removal of the existing Magistrate." 2 Farrand 612-13. This argument apparently swayed the Convention which defeated the proposal eight to three. 2 Farrand 162-13.

The Pinckney Plan called for expressly granting the President, as opposed to Congress, to "suspend Officers, civil and military." 2 Farrand 158. Instead, the authority to appoint and remove "'inferior officers'" of the national government was left divided between the Executive and the Legislature. *E.g.*, Freytag v. C.I.R., 501 U.S. 868, 883 (1991); Bowsher v. Synar, 478 U.S. 714, 729 (1986). There was never a question that, as between the federal and State governments, each had the power to discipline their own employes.

Absent personal constitutional rights, just as "no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." Ullman v. United States, 350 U.S. 422, 428 (1956). Allowing Congress to police itself in not devouring the Tenth Amendment, declaring the Guarantee Clause beyond the scope of judicial review and deferring to agencies as woefully derelict as USDOL would subordinate or delete Constitutional guarantees of State powers far more effectively than direct assaults. The continuing destruction of State powers which renegade agencies, compounded by appellate court abdication, can cause -- despite political and ideological changes in the Presidency

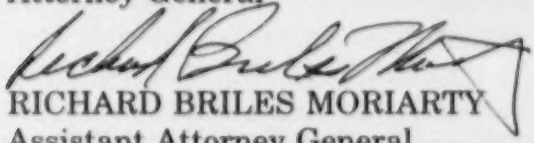
and the Congress and headline declarations about returning power to the States -- proves the Garcia hypothesis, that the political process would protect the States, is wrong. This Court is the last safeguard to protect these guarantees.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

JAMES E. DOYLE
Attorney General



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No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.,

Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.,

Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

ADDITIONAL APPENDIX
REPLYING TO BRIEFS
OPPOSING PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL FEDERAL REGISTER PUBLICATIONS INVOLVED

14 Fed. Reg. 7703 and 7735 (December 28, 1949) -- published by USDOL to create 29 C.F.R. § 541.118 -- states, in relevant part:

TITLE 29--LABOR

. . .

PART 541-- . . .

INTERPRETATIONS OF REGULATIONS

. . .

. . . [Revisions of the regulations were published on December 24, 1949 as 29 C.F.R. Part 541, Subpart A.] For the purpose of outlining and explaining the application of these regulations to specific types of situations, an explanatory bulletin has been prepared which interprets these regulations in the light of their application to specific factual situations. This explanatory bulletin contains statements of general policy and interpretations directly related to the regulations . . . . The text of such explanatory bulletin is as follows:

SUBPART B--INTERPRETATIONS

* * *

§ 541.118 *Salary basis.* (a) An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for

any week in which he performs any work without regard to the number of days or hours worked.

(b) *Minimum guarantees plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $55 or more a week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations in Subpart A of this part. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in Subpart A of this part in any week in which he performs any work. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $100 may not arbitrarily be divided into a guaranteed minimum of $55 paid in each week in which any work is performed, and an additional $45 which is made subject to deductions.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. For this purpose, an extended voluntary leave of absence may be considered to come within this rule. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations in Subpart A of this part if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations in Subpart A of this part.

50 Fed. Reg. 47696-47997 (November 19, 1985) -- published by USDOL -- states, in relevant part:

> **SUMMARY:** The Wage and Hour Division is considering proposing revisions [to 29 C.F.R. Part 541]....Comments are invited concerning the current definitions of terms relating to the salary, duties, and responsibilities tests for [exempt] employees, as well as the interpretations of such definitions.
>
> ...
>
> Accordingly, comments are sought from interested parties concerning the

matters set forth below, as well as any other issues of interest under this regulation.

I. Salary Tests.

....Comments are sought with respect to the following matters related to the salary tests:

....

2. Should the salary tests be eliminated? If so, what tests should [USDOL] rely on to determine applicability of the 29 U.S.C. § 213(a)(1)] exemption? What would be the economic impact of the elimination of the salary tests?

....

10. Should [USDOL] recognize individual State and local government civil service systems for classifying [executive, professional and administrative] employees in applying the exemption to employees of such governments? Such recognition would not alter the traditional FLSA principle that an employer who claims an exemption under the Act has the burden of showing that it applies.

54 Fed. Reg. 44828, 44836 and 44837 (October 30, 1989) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . . The agenda includes all regulations which are expected to be under review or development between October 1989 and October 1990.

. . . [The President and Congress have required this agenda since 1981.]

* * *

1457. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
Comments Due on Suspension Proposal	04/26/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
Next Action Undetermined		

. . .

Additional Information: . . . Regulatory action will be delayed to allow the Administration sufficient time to consider these issues.

. . .

55 Fed. Reg. 16371 and 16372 (April 23, 1990) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1990 and April 1991.

. . . [The President and Congress have required this agenda since 1981.]

* * *

1608. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

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Comments Due on Suspension Proposal	04/26/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
Next Action Undetermined		

. . .

55 Fed. Reg. 44680 and 44689 (October 29, 1990) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between October 1990 and October 1991.

* * *

1691. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
Comments Due on Suspension Proposal	04/26/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
Next Action Undetermined		

. . .

56 Fed. Reg. 17530 and 17537 (April 22, 1991) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1991 and April 1992.

. . . [The President and Congress have required this agenda since 1981.]

* * *

1842. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
Comments Due on Suspension Proposal	04/26/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From	01/17/86	51 FR 2525

01/21/86 to 03/22/86		
ANPRM Comment Period End	03/22/86	51 FR 2525
To be determined	03/00/92	

. . .

56 Fed. Reg. 53558 and 53567 (October 21, 1991) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between October 1991 and October 1992, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

1993. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was

published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
NPRM Public Sector Overtime Liability	09/06/91	56 FR 45828
Interim Final Rule Effective Date	09/06/91	56 FR 45824
Interim Final Rule--Exception From Salary Basis Definition	09/06/91	56 FR 45824
Interim Final Rule Comment Period End	10/07/91	56 FR 45824
Next Action To Be Determined	03/00/92	

. . .

Additional Information: . . . As a result of recent developments in private litigation, the Department has determined that it is necessary to revise the regulations for exemption of public sector employees. Specifically, the Department intends to revise the regulations to provide an

exception from the requirement for payment "on a salary basis" to reflect public sector compensation practices which, in some cases, are based on statutes or regulations regarding the accountability of public employees. The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

57 Fed. Reg. 16952 and 16960 (April 27, 1992) -- published by USDOL as part of a Semiannual Agenda of Regulations -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1992 and April 1993, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

1628. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations

was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
Next Action Undetermined		

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

57 Fed. Reg. 51556 and 51565 (November 3, 1992) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between October 1992 and October 1993, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

1927. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525

ANPRM 03/22/86 51 FR 2525
Comment
Period End
Next Action Undetermined

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

58 Fed. Reg. 24562 and 24569 (April 26, 1993) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1993 and April 1994, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

2024. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations

was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
ANPRM Second	O9/00/93	

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

58 Fed. Reg. 56580 and 56587 (October 25, 1993) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between October 1993 and October 1994, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

2109. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525

ANPRM 03/22/86 51 FR 2525
Comment Period
End
ANPRM Second 00/00/00

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

59 Fed. Reg. 20602 and 20610 (April 25, 1994) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1994 and April 1995, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

2148. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

. . .

Economically significant: Yes.

. . .

Legal Deadline: None

. . .

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more

comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
ANPRM Second	00/00/00	

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

59 Fed. Reg. 57127, 57129 and 57130 (November 14, 1994) -- published by USDOL -- states, in relevant part:

. . .

1994 Regulatory Plan

. . .

. . . [This] 1994 Regulatory Plan includes 21 of the Department's most significant important regulations . . . [although] it is important to note that the Department views every regulatory effort it undertakes as important and necessary.

. . . Our goal is to develop regulations that are effective, consistent, sensible and understandable. To this end, we are committed to coordinating with other government agencies and working closely with target populations and the regulated community whenever appropriate.

. . .

[Numerous types of regulations listed including brief mention of those applicable to the FLSA exemptions.]

* * *

96. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

. . .

Legal Deadline:

None

Abstract:

. . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.] . . . [R]evisions [in 1992 to adopt 29 C.F.R.

§ 541.5d] were limited in nature and the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors. All of these factors have led the Department to conclude that a review of these regulations is both necessary and appropriate. The Department intends to solicit input through a public hearing process to identify issues and to develop regulatory proposals.

Statement of Need:

. . .

Because of the limited nature of . . . revisions [such as 29 C.F.R. § 541.5d in 1992], the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors.

Alternatives: Because the regulations are sorely out of date, a comprehensive rulemaking is necessary. The Department intends to reopen the comment period of the November 1985 advance notice of proposed rulemaking and to obtain additional information pertaining to matters that have arisen subsequently through a hearing process. Following these activities, full regulatory alternatives will be developed.

Anticipated Costs and Benefits:

Some 23 million employees are estimated to be within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without

considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear and comprehensive regulations will once again provide for central, uniform control over application of these regulations and eliminate this apprehension.

In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s and that they do not readily adapt to contemporary government functions. . . . Resolution of these conflicts over how the regulations are to be applied in the public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable. . . .

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
NPRM	04/00/95	

. . .

60 Fed. Reg. 23536, 23544 and 23545 (May 8, 1995) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1995 and April 1996, . . .

* * *

2055. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

. . .

Legal Deadline: None

. . .

Abstract: . . . The [threshold weekly salary amounts required for exempt status] have not been undated since 1975. The Department has, however, made limited revisions to these regulations to address specific issues [including the adoption of 29 C.F.R. § 541.5d in 1992]. . . . Recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors. All of these factors have led the Department to conclude that a review of these regulations is both necessary and appropriate.

Statement of Need: . . . These regulations have been revised in recent years to deal with specific amendments or issues [including the adoption of 29 C.F.R. § 541.5d in 1992]. . . .

Because of the limited nature of these revisions, the regulations are still in need of updating and clarification, especially with regard to applicability to public sector employment. In addition, recent court rulings have caused confusion on what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors.

Alternatives: Because the regulations are sorely out of date, a comprehensive review is necessary. Regulatory alternatives will be developed as part of the review.

Anticipated Costs and Benefits: Some 23 million employees are within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear and comprehensive regulations will once again provide for central, uniform control over application of these regulations.

. . .

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment	01/17/86	51 FR 2525

Period From
01/21/86 to
03/22/86
ANPRM 03/22/86 51 FR 2525
Comment Period
End
NPRM 10/00/95

60 Fed. Reg. 59608, 59613 and 59614 (November 28, 1995) -- published by USDOL -- states, in relevant part:

. . .

Statement of Regulatory Priorities

. . .

DOL's framework of rules undergoes continual change. . . . It must also be updated to take into account changes in the workplace. . . . In addition, the Department recognizes that a comprehensive review of the framework is periodically needed to eliminate those sections that are outdated and to reinvent those parts that are unreasonably burdensome or confusing. DOL has recently undertaken such a review in response to President Clinton's April 24, 1995, "Regulatory Reinvention Initiative." . . .

. . .

[Numerous sets of regulations listed including brief mention of those applicable to the FLSA exemptions.]

* * *

DOL-ESA
67. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)
Priority:

Economically Significant

. . .

Legal Deadline:

None

Abstract:

. . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

The Department has revised these regulations since the ANPRM to address specific issues [including adoption of 29 C.F.R. § 541.5d]. . . . These revisions were limited in nature and the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors. All of these factors have led the Department to conclude that a review of these regulations is both necessary and appropriate.

Statement of Need:

. . .

Because of the limited nature of these revisions [including adoption of 29 C.F.R. § 541.5d], the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors.

Alternatives:

The Department has met with affected interest groups in developing regulatory alternatives. Following completion of these outreach and consultation activities, full regulatory alternatives will be developed. Although legislative proposals have been introduced in the Congress to address certain aspects of these regulations, the Department will continue to pursue revisions to the regulations as the appropriate response to the concerns raised. Alternatives likely to be considered include particular changes to address "salary basis" and salary level issues to a comprehensive overhaul of the regulations that also addresses the duties and responsibilities tests.

Anticipated Costs and Benefits:

Some 23 million employees are estimated to be within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate this apprehension. In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s, and that they do not readily adapt to contemporary government functions. . . . Resolution of confusion over how the regulations are to be applied in the

public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable.

. . .

. . .

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
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ANPRM Comment Period End	03/22/86	51 FR 2525
NPRM	06/00/96	
NPRM Comment Period End	08/00/96	

. . .

(5)

Supreme Court, U.S.
FILED
MAR 19 1996
CLERK

No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

SUPPLEMENTAL BRIEF AND APPENDIX

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No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

SUPPLEMENTAL BRIEF AND APPENDIX

ARGUMENT

I. An arm of Congress declares the salary basis test an "interpretative bulletin" governed by Skidmore analysis.

The decision below hinges on assuming the salary basis test in 29 C.F.R. § 541.118, including the

disciplinary deduction standard, was a legislative "regulation" issued under 29 U.S.C. § 213(a)(1) to which Chevron deference was owed. App. 1, 2, 3, 5, 6, 7 and 8; Petition, pp. 15-17; Reply, pp. 17-21. An arm of Congress now definitively confirms the error of that assumption.

Applying the Fair Labor Standards Act, 29 U.S.C. §§ 207 *et seq.* (the FLSA), to employes of Congress, the Congressional Office of Compliance has declared the salary basis test is **not** a "substantive regulation" entitled to Chevron deference but is instead an "interpretative bulletin" governed by Skidmore analysis. 142 Cong. Rec. S196 (cols.2&3), S222 (cols.1&2) and S224 (col.1) (daily ed. January 22, 1996) (S.App. 144-149).[1] Congress, to sensitize its members to the FLSA as enforced by USDOL, applied the FLSA to all Congressional employes. The Congressional Accountability Act, 2 U.S.C. §§ 1301 *et seq.* (the CAA). The CAA was intended to restrict Congress to "the same legal safe-harbors that [USDOL] has made available to private sector and State and local government employers" (142 Cong. Rec. S223 (col.3) (daily ed. January 22, 1996) (S.App. 147)) and to "require Congress to experience the same compliance burdens faced by other employers so that it could more fairly legislate in this area" (*id.* at S222 (col.1) (S.App. 146)). The Office of Compliance recognized other employers have "few such safe harbors, particularly in the area of exemptions." (*id.* at S223 (col.3) (S.App. 147).

To achieve these purposes, the CAA mandated that the Office of Compliance, in enforcing the CAA, apply the same "substantive regulations" to Congressional employes which USDOL applies to other employers under the FLSA. 2 U.S.C. §§ 1313(c)(2) and 1381(a). Discharging this mandate, the Office of Compliance had "carefully

---

[1]The cited commentary applies to Senate employes. It is repeated for other employes. *Id.* at S233 to S236, S245 to S248.

review[ed] the entire corpus of [USDOL's] regulations." 142 Cong. Rec. S224 (col.3) to S 225 (col.1) (daily ed. January 22, 1996) (S.App. 148). The Office of Compliance then adopted its own regulations. *Id.* at S196 *et seq.*

The Office of Compliance concluded that the contents of "Subpart B of Part 541", i.e., 29 C.F.R. Part 541, Subpart B which includes the salary basis test and disciplinary deduction standard, "are **not** substantive regulations within the meaning of [the FLSA]" but are instead "interpretive bulletins" governed by Skidmore analysis. 142 Cong. Rec. S222 (col.1&2) (daily ed. January 22, 1996) (S.App. 146-147), emphasis added. As partial support for concluding Skidmore analysis applies, the Office noted a recent Seventh Circuit decision which properly held USDOL's "interpretive bulletins" under the FLSA are only "'give[n] . . . the respect their reasoning earns them.'" 142 Cong. Rec. S222 (col.2) (daily ed. January 22, 1996) (S.App. 147), quoting Reich v. Interstate Brands Corp., 57 F.3d 574, 577 (7th Cir. 1995).

The Office of Compliance then focused on USDOL's creation of a salary requirement as an exemption criterion. Unlike other federal employes, whose exempt status has never been governed by any salary requirement (Petition, p. 10; Reply, p. 14; App. 52-55, 76-82), the CAA, by imposing USDOL's substantive regulations on Congressional employment, mandated that the salary requirement in 29 C.F.R. §§ 541.1, 541.2 and 541.3 be adopted for Congressional employes. 142 Cong. Rec. S223 (col.3) to S224 (col. 1) and S227 (col.3) to S228 (col.3) (daily ed. January 22, 1996).

The effect of that general salary requirement on Congress will, however, likely be far different than its effect on State and local governments. The Office of Compliance also adopted 29 C.F.R. § 541.5d as a "substantive regulation" which recognizes that public accountability principles limit the application of the FLSA

to public sector employes such as Congressional employes. 142 Cong. Rec. S224 (col.1) (daily ed. January 22, 1996) (S.App. 148). By contrast, it found the salary basis test, 29 C.F.R. § 541.118, was only "an interpretative bulletin" which it need not address. *Id.* To avoid even implying it agreed with the salary basis test, the Office of Compliance expressly altered its version of 29 C.F.R. § 541.5d to exclude any reference to 29 C.F.R. § 541.118. 142 Cong. Rec. S224 (col.1) (daily ed. January 22, 1996) (S.App. 148). In interpreting the meaning of being paid "on a salary basis" under the substantive exemption regulations, 29 C.F.R. §§ 541.1, 541.2 and 541.3, as they apply to Congressional employes, the Office of Compliance will apparently exercise its independent judgment. *Id.*

Congressional employes, like other federal employes, are subject to ranges of discipline far wider than the narrow confines of the disciplinary deduction standard in 29 C.F.R. § 541.118(5). *E.g.,* 2 U.S.C. § 60-1(a)(2) (S.App. 144). Congress has long intended its own supervisory officers to have broad and open-ended disciplinary authority (*e.g.,* Witty v. Jones, 563 F.Supp. 415, 417 (D.D.C. 1983)) because "operations under the supervision of those officers are to be carried out with reasonable efficiency" (1970 U.S.Cong. & Admin. News, Vol. 3, p. 4445). Its committee rules routinely authorize "suspension" of employes as discipline. *E.g.,* 141 Cong. Rec. S2895 (col.3) (daily ed. February 16, 1995); 139 Cong. Rec. S1649 (col.1) (daily ed. February 16, 1993); 139 Cong. Rec. S638 (col.2) (daily ed. January 22, 1993); 138 Cong. Rec. S10945 (col.1) (daily ed. July 30, 1992). If the disciplinary deduction standard applied, no Congressional employe would be exempt.

Despite the intent of Congress to apply the FLSA to Congressional employing agencies in the same way it applies to State, local and private employers -- "[u]nder the CAA, they are legally entitled to no more" (142 Cong. Rec. S223 (col.3) (daily ed. January 22, 1996) (S.App.

147)) -- the decision below, if it stands, would create substantial disparities. The Office of Compliance has concluded Congress plainly intended Congressional employers to take advantage of those exemptions. 142 Cong. Rec. S224 (col.3) to S225 (col.1) and S227 (col.3) to S228 (col.3) (daily ed. January 22, 1996). The Office of Compliance must both examine all federal laws on "disciplinary procedures" and other personnel issues (2 U.S.C. § 1302(b)(1)) and "require Congress to experience the same compliance burdens faced by other employers" (142 Cong. Rec. S222 (col.1) (S.App. 146) (daily ed. January 22, 1996)). It will likely reject part of a mere interpretative bulletin which, in the face of laws and Committee rules allowing open-ended discipline of all Congressional employes, would preclude all exemptions under the FLSA. The decision below, by deferring to the disciplinary deduction standard as if it were a regulation expressing legislative intent would, unless corrected, impose on States far heavier and differing FLSA burdens than those Congress now imposes on itself and would impose burdens Congress never intended to create.

With the FLSA extension to Congressional employes having taken effect on January 23, 1996, the Senate and House enacted resolutions unanimously approving the Office of Compliance FLSA regulations on an interim basis. 142 Cong. Rec. S225 (col.3), S284 (col.3) to S285 (col.1) and D22 (daily ed. January 22, 1996). Approval on a final basis is now before Senate and House committees. 142 Cong. Rec. D128 (daily ed. February 29, 1996); 142 Cong. Rec. D139 (daily ed. March 5, 1996); 142 Cong. Rec. D148 (daily ed. March 6, 1996). Final approval is expected by April 15, 1996. 142 Cong. Rec. S225 (col.1) (daily ed. January 22, 1996) (S.App. 149). Through these regulations, an arm of Congress confirms -- and Congress itself may soon confirm -- that the salary basis test, with its disciplinary deduction standard, is merely an interpretative bulletin governed by Skidmore analysis.

II. USDOL now informs courts that the decision below by the Seventh Circuit and the Service Employees decision by the Ninth Circuit are in "direct conflict".

USDOL, opposing the petition here, argued that "there is no direct conflict warranting this Court's review" between the decision below by the Seventh Circuit Court of Appeals and the decision in Service Employees International Union, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 774 (1996). USDOL brief, p. 24. Perhaps in recognition that courts are reading Service Employes and Mueller as being in direct conflict (*e.g.*, Auer v. Robbins, 65 F.3d 702, 710, n. 6 (8th Cir. 1995), *cert. pending*, No. 95-897 (filed Dec. 7, 1995)), USDOL now informs other courts that the circuit courts are in "direct conflict".

USDOL is arguing to the Sixth Circuit Court of Appeals, in a case examining whether the disciplinary deduction standard applies to State employers, that a "direct conflict" exists between Service Employees holding the salary basis test was entirely invalid prior to September 1991 and Mueller holding "the disciplinary part of the Secretary's 'salary basis' test is valid." USDOL *amicus* brief, pp. 16, 24-25, in Jackson v. Commonwealth of Kentucky, Nos. 95-6283 and 95-6284 (filed March 5, 1996), on appeal from 892 F.Supp. 923 (E.D.Ky. 1995) (S.App. 150-151).

Noting the Jackson district court adopted the Service Employees holding that "the entire 'salary basis' test as applied to the public sector prior to 1991" was invalid, USDOL argued this was "inconsistent with [the Jackson district court's] holding" that the test after 1991 "is valid in its entirety, **since the disciplinary portion of the test was not changed in 1991**." (USDOL Jackson brief, p. 24 (S.App. 150-151), emphasis added.)

USDOL then argued that "[t]his conclusion" by the Jackson district court reiterating the holding in Service Employees "is also in **direct** conflict with the Seventh Circuit's holding in Mueller v. Reich, [citation omitted], where the court stated that the disciplinary part of the Secretary's "salary basis" test is valid." USDOL Jackson brief, pp. 24-25 (S.App. 151), emphasis added.

This Court will determine the nature of any actual conflict in the circuits. USDOL now informs other courts that a direct conflict does exist -- which USDOL would aggravate through advocacy rather than eliminate through meaningful rulemaking. At a minimum, an indirect conflict exists (Petition, pp. 10-11 and n. 2) which, given the vital Constitutional interests involved, should be resolved by this Court.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES STATUTES

2 U.S.C. § 60-1 states, in relevant part:

> § 60-1. Authority of officers of the Congress over Congressional employees
>
> **(a) . . . discipline**
>
> Each officer of the Congress having responsibility for the supervision of employees, . . . shall have authority--
>
> . . .
>
> (2) to remove or otherwise discipline any employee under his supervision.

REGULATORY ACTIONS BY OFFICE OF COMPLIANCE, U.S. CONGRESS

142 Cong. Rec. S196, S221, S222, S224, S225 (daily ed. January 22, 1996) states in relevant part:

> [S196 (col.2)]
> NOTICE OF ADOPTION OF PROCEDURAL RULES
>
> Mr. THURMOND. Mr. President, pursuant to the Congressional Accountability Act of 1995 [3 U.S.C. §§ 1301 *et seq.*], a Notice of Adoption of Regulations and Submission for Approval and Issuance of Interim Regulations, together with a copy of the adopted regulations, was submitted by the Office of Compliance, U.S. Congress. These final rules implement the rights and protections of the following statutes made applicable by the Congressional Accountability Act: . . . Fair Labor Standards Act, ...
>
> . . .
>
> The notice announces the adoption of the final regulation as an interim regulation

on the same matters. Additionally, these notices include the Board's recommendations as to the method of House and Senate approval of the final regulations.

[Notice and regulations published by unanimous consent.]

. . . [S221 (col.2]

SENATE

FAIR LABOR STANDARDS ACT, FINAL AND INTERIM REGULATIONS RELATING TO THE SENATE AND ITS EMPLOYING OFFICES

OFFICE OF COMPLIANCE--THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938.

NOTICE OF ADOPTION OF REGULATIONS AND SUBMISSION FOR APPROVAL AND ISSUANCE OF INTERIM REGULATIONS

. . . The interim regulations shall expire on April 15, 1996 or on the dates on which the appropriate resolutions concerning the Board's final regulations are passed by the House and Senate, respectively, whichever is earlier.

. . . [S221 (col. 3)]

II. Consideration of public comments; the Board's response and modifications to the NPR's rules

A. Requests that the Board provide additional guidance, including interpretative bulletins and opinion letters.

. . . [S222 (col. 1)]

At the outset, the Board must decline the suggestion that it modify the Secretary's regulations in order to remove the ambiguities and resulting uncertainties that Congressional offices will face in complying with the CAA once it takes effect. . . . As is true of many regulatory issues, ambiguity and uncertainty are part of the FLSA regulatory regime that is presently imposed --with much criticism and protest--on private sector and state and local government employers.

The example of the executive, administrative and professional employee exemptions illustrates this point. The Board specifically highlighted this problem and asked for comment in its ANPR (141 Cong. Rec. S14542, S14543) on September 28, 1995. Although the Board received many comments on the issue and is sympathetic with the concerns of employing offices confronting such ambiguity and uncertainty, the Board has neither been given nor can find appropriate justification for relieving employing offices of the compliance burdens that all employers face under the FLSA. The CAA was intended not only to bring covered employees the benefits of the FLSA and other incorporated laws, but also to require Congress to experience the same compliance burdens faced by other employers so that it could more fairly legislate in this area. The Board cannot agree with suggestions that would rob the CAA of one of its principal intended effects.

The Board must also decline the suggestion that it adopt, as either formal regulations or as its own interpretative

authority, the interpretive bulletins found in Subpart B of Part 541 [29 C.F.R. Part 541, Subpart B] . . . . Section 203(c)(2) of the CAA requires the Board to promulgate regulations that are the same as the substantive regulations promulgated by the Secretary [of Labor]. . . . [T]he interpretative bulletins set forth in Subpart B of Part 541 . . . are not substantive regulations within the meaning of [the FLSA]. . . .

. . . [S222 (col. 2)]

. . . [L]ike the Administrator [of the Wage and Hour Division] and the courts, the Board intends to depart from the interpretative bulletins only where their persuasive force is lacking or the law otherwise requires (just as courts or the Administrator would do). *See Skidmore v. Swift & Co.*, 323 U.S. 134, 137-38 (1944); *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 577 (7th Cir. 1995) ("[W]e give the Secretary's bulletins the respect their reasoning earns them."); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990)("the persuasive authority of a given interpretation obtains only so long as [']all those factors which give it power to persuade['] persist.") quoting *Skidmore*).

. . . [S223 (col.3)]

. . . The FLSA as currently applied to private employers contains few . . . safe-harbors, particularly in the area of exemptions. . . . And [Congressional] employing offices have the benefit of the same legal safe-harbors that the Secretary of Labor has made available to private sector and State and local government employers. Under the CAA, they are legally entitled to no more.

. . .

B. Specific comments and Board action.

. . . [S224 (col.1)]

2. §541.5d--Special rule for "white collar" employees of a public agency

[The Board is adopting 29 C.F.R. §§ 541.1, 541.2 and 541.3 since] they are substantive regulations. . . .

. . . [29 C.F.R. § 541.5d is a substantive regulation the Board initially proposed not to adopt but is now adopting for reasons articulated by a commentator].

The Board finds merit in the commentator's argument. Moreover, the adoption of this regulation is well in keeping with the Board's mandate to promulgate rules that are "the same as substantive regulations promulgated by the Department of Labor to implement" those FLSA statutory provisions made applicable by the CAA. Accordingly, § 541.5d will be adopted with a minor change that substitutes for the citation to § 541.118 (an interpretative bulletin) the phrase "being paid on a salary basis," which is derived directly from the substantive regulations defining the "white collar" exemptions (i.e., 29 C.F.R. §§ 541.1, .2, .3).

. . .

5. Board determination on regulations "required" to be issued in connection with § 411 default provision

. . . [S225 (col.1)]

The Board has carefully reviewed the entire corpus of the Secretary's regulations . . . [and] has acted based on this review and consideration and in order to prevent wasteful litigation about whether the omission of a regulation from the

Secretary in the Board's regulations was intended or not.

. . .

III. Adoption of Proposed Rules as Final Regulations under Section 304(b)(3) and as Interim Regulations

Having considered the public comments to the proposed rules, the Board pursuant to section 304(b)(3)&(4) of the CAA is adopting these final regulations and transmitting them to the House and Senate with recommendations as to the method of approval by each body under section 304(c). . . . For the reasons explained below, the Board is also today adopting and issuing these rules as interim regulations that will be effective as of January 23, 1996 or the time upon which appropriate resolutions of approval of these interim regulations are passed by the House and/or the Senate, whichever is later. These interim regulations will remain in effect until the earlier of April 15, 1996 or the dates upon which the House and Senate complete their respective consideration of the final regulations that the Board is herein adopting.

. . . [S225 (col.3)]

The House has . . . already signalled its approval of [these] interim regulations both for itself and for the instrumentalities. On December 19, 1995, the House adopted H. Res. 311 and H. Con. Res. 123, which approve "on a provisional basis" regulations "issued by the Office of Compliance before January 23, 1996." . . . .

BRIEF FILED BY USDOL ON MARCH 5, 1996

USDOL *amicus* brief, pp. 16, 24 and 25, in Jackson v. Commonwealth of Kentucky, Nos. 95-6283 and 95-6284 (filed March 5, 1996), on appeal from 892 F.Supp. 923 (E.D.Ky. 1995), states, in relevant part:

> In the [district] court's view [in Jackson], since one part of the 'salary basis' test was infirm, the whole test was fatally flawed before 1991. In so concluding, the district court found "particularly persuasive" the reasoning of the Ninth Circuit in SEIU, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1995) (with supplemental opinion), *cert. denied*, 64 U.S.L.W. 3484 (U.S. Jan. 16, 1996) (No. 95-724). Jackson, 892 F.Supp. at 929. The district court erred by relying on SEIU in invalidating the Secretary's "salary basis" test prior to 1991.
>
> * * *
>
> Finally, and even more unjustifiably, the district court accepted without explanation SEIU's invalidation of the entire "salary basis" test as applied to the public sector prior to 1991 based upon the limited modification of the test dealing with partial-day deductions. See Jackson, 892 F.Supp. at 929. There is absoluteely no support for this ruling. The "salary basis" test is not indivisible, and the invalidity of one part of the test does not mean that the whole test must fail. Cf. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985) ("Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid."). The court in SEIU

did not even focus on the disciplinary portion of the test, but instead spoke only to the partial-day deduction part of the regulation. The district court's conclusion that the whole test was invalid prior to 1991 is also inconsistent with its holding that the Secretary's "salary basis" regulation post-1991 is valid in its entirety, since the disciplinary portion of the test was not changed in 1991. This conclusion is also in direct conflict with the Seventh Circuit's hilding in Mueller v. Reich, 54 F.3d 438, 441-443 (7th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3297 (U.S. Oct. 10, 1995) (No. 95-586), where the court stated that the disciplinary part of the Secretary's "salary basis" test is valid. (For a more detailed discussion of this part of the test, see infra.) In sum, DOL's "salary basis" test as applied to the public sector was valid in its entirety prior to the 1991 regulatory change and the district court's decision holding otherwise should be reversed.

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MAY 3 1 1996

No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE OPINION AND DECISION FOR WANT OF JURISDICTION

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RELIEF REQUESTED

The State defendants move to grant a writ of certiorari and to vacate the appellate opinion and decision because, under Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124-28, 1131-32 (1996), the federal courts never obtained subject matter jurisdiction over this action. This outcome-determinative development should be

brought to the Court's attention. Bd. of License Comm'rs of Town of Tiverton v. Pastore, 469 U.S. 238, 240 (1985).

REASONS RELIEF SHOULD BE GRANTED

Wisconsin employes, the only plaintiffs, seek monetary relief from the State defendants under the Fair Labor Standards Act, 29 U.S.C. §§ 207 *et seq.* (the FLSA). Mueller v. Reich, 54 F.3d 438, 440, 442-43 (7th Cir. 1995), *petition for cert. pending*, Wisconsin v. Mueller, No. 95-586 (App. 1, 5-8). Congress had no authority to allow them to do so. Seminole Tribe, 116 S.Ct. at 1124-28, 1131-32.

The Eleventh Amendment to the United States Constitution (U.S.Const., Amend XI) bars individuals from suing States in federal court unless either (a) Congress, through constitutionally authorized abrogation of Eleventh Amendment immunity, allows the suits or (b) the State consents to the suits. Seminole Tribe, 116 S.Ct. at 1122-23. Since neither exception applies here, Eleventh Amendment immunity barred federal courts from obtaining jurisdiction over plaintiffs' FLSA claims. *Id.*, 116 S.Ct. at 1124-28, 1131-32.

Until March 27, 1996, it appeared Congress could abrogate, and had abrogated, Eleventh Amendment immunity so that States were subject to private causes of action by their own employes under the FLSA. *E.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Hale v. State of Arizona, 993 F.2d 1387, 1391 (9th Cir. 1993) (*en banc*). Seminole Tribe, on March 27, 1996, expressly overruled Union Gas and held Congress was never constitutionally authorized to create private causes of action in federal court against States under statutes grounded solely on the authority of the Commerce Clause (U.S.Const., Art. I, § 8). 116 S.Ct. at 1124-28, 1131-32.

This is as true for interstate commerce as Indian Commerce which, by contrast, is exclusively within

Congressional control. 116 S.Ct. at 1126-27. "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause" and there is "no principled distinction to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." 116 S.Ct. at 1126-27. Crystal clear Congressional intent to abrogate Eleventh Amendment immunity by creating private causes of action under statutes grounded in the Commerce Clause has no effect because Congress entirely lacks any constitutional authority to abrogate Eleventh Amendment immunity in that fashion. 116 S.Ct. at 1124-28, 1131-32.

The jurisdictional holdings announced in Seminole Tribe bar this action. The plaintiffs are private individuals. Mueller, 54 F.3d at 440-41 (USDOL and Secretary chose not to become plaintiffs). The Commerce Clause is the sole constitutional authority for the FLSA. *E.g.*, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530 (1985); National League of Cities v. Usery, 426 U.S. 833, 840 (1976). Since the FLSA is not grounded on the Fourteenth Amendment to the United States Constitution (U.S.Const., Amend. XIV), its broader intrusion on State authority (Seminole Tribe, 116 S.Ct. at 1125) is inapplicable. The issue of prospective injunctive relief (*id.*, 116 S.Ct. at 1132-33) is also inapplicable since private individuals are limited to only monetary relief under the FLSA. *E.g.*, Barrentine v. Arkansas-Best Freight System, 750 F.2d 47, 51 (8th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); Lorillard v. Pons, 434 U.S. 575, 581 (1978). Congress never had authority to subject States and their officers to private causes of action for monetary relief under the FLSA or under other statutes grounded on the Commerce Clause. Seminole Tribe, 116 S.Ct. at 1124-28, 1131-32.

Wisconsin has not consented to any FLSA suit. A State litigant does not surrender Eleventh Amendment

immunity even if it expressly refuses to take advantage of that immunity. Patsy v. Florida Bd. of Regents, 457 U.S. 496, 515, n. 19 (1982) (though defendant did not raise Eleventh Amendment until appeal, never argued it and declined Court's suggestion of resolution on those grounds, "[n]othing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand. . . . "). A State consents to suit in federal court only where its Constitution or statutes, by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable implication, declare intent to surrender immunity against suit in federal court. *E.g.*, Port Authority Trans-Hudson v. Feeney, 495 U.S. 299, 305-07 (1990). Wisconsin's Constitution or statutes never consented to the State defendants being sued in federal court under the FLSA. *Cf.* Wis. Const., Art. IV, § 27; Weinberger v. State of Wisconsin, 906 F.Supp. 485, 491 (W.D.Wis. 1995); Stoner v. Dep't of Agriculture, Trade & Consumer Protection, 50 F.3d 481, 482-83 (7th Cir. 1995); Granados v. Reivitz, 776 F.2d 180, 183 (7th Cir. 1985). *See also* Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health and Welfare, 411 U.S. 279, 284-85 (1973) (absent proper abrogation, FLSA suits against unconsenting States barred).

Vacating the appellate decision is not sufficient. The opinion should be vacated because the appellate court lacked jurisdiction. *E.g.*, Donovan v. Richland County Ass'n, 454 U.S. 389, 390 (1982) (*per curiam*). Just vacating the decision allows the opinion to stand as precedent. *E.g.*, In re Smith, 964 F.2d 636, 638 (7th Cir. 1992). A court without jurisdiction to act is powerless to create binding precedent. *E.g.*, Donovan, 454 U.S. at 390. This Court, similarly lacking jurisdiction under Seminole Tribe, should exercise its broad supervisory authority to preclude the appellate decision and opinion from "spawning legal consequences." *E.g.*, United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950).

Respectfully submitted,

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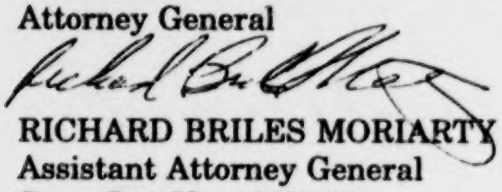

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In The

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UNITED STATES DEPARTMENT OF LABOR,
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Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

RESPONDENT'S OPPOSITION TO MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE OPINION AND DECISION FOR WANT OF JURISDICTION

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October Term, 1995

♦

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GERALD R. MUELLER,
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♦

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

♦

RESPONDENT'S OPPOSITION TO MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE OPINION AND DECISION FOR WANT OF JURISDICTION

♦

Petitioner has moved the Supreme Court to Grant Writ of Certiorari and to Vacate Opinion and Decision for Want of Jurisdiction. The Petitioner's subject matter jurisdiction arguments have not

been considered or decided by any lower court. In fact, just two weeks prior to the Petitioner's Motion to the Supreme Court, the Petitioner filed a Motion raising the very same subject matter jurisdiction challenge in the district court. The district court Motion has not yet been briefed, argued, or decided.

The Petitioner's Motion bases its challenge on the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996). However, the Petitioner fails to mention the fact that the State of Wisconsin has expressly waived its sovereign immunity with respect to actions for overtime wages brought pursuant to the provisions of the Fair Labor Standards Act. *See*, §§ 109.01(2), 109.01(3), 109.03(5), 103.01(1)(b), 103.02, Wis. Stats. and Ind. §§ 74.01(4), 74.015, 74.08 Wis. Adm. Code. Therefore, even assuming *arguendo* that the Seminole Tribe decision applies to actions brought pursuant to the Fair Labor Standards Act, Seminole Tribe does not provide any additional basis for granting the State of Wisconsin's Petition under the present facts. *See e.g.*, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n.1, Estate of Porter by Nelson v. State of Illinois, 36 F.3d 684 ,690 (7th Cir. 1994) ("A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program").

Furthermore, three additional circuits have now rendered decisions consistent with the Seventh Circuit's holding in Mueller v. Reich, 54 F.3d 438

(7th Cir. 1995) upholding the application of 29 C.F.R. § 541.118(a)(5) to the public sector. *See*, Yourman v. Dinkins, 1996 WL 284688 (2nd Cir. 1996), Balgowan v. New Jersey, 1996 WL 255930 (3rd Cir. 1996), Carpenter v. City and County of Denver, 82 F.3d 353, 356 (10th Cir. 1996). The Circuits are in complete uniformity on this issue.

This court should not accept Petitioner's invitation to act precipitously in endorsing the Petitioner's subject matter jurisdiction challenge. Petitioner's Motion to Grant Writ of Certiorari and to Vacate Opinion and Decision for Want of Jurisdiction should be denied. In the event this court decides to vacate the court of appeals decision and remand it for further consideration in light of Seminole Tribe, the issues certified for consideration on remand should include (1) whether the holding in Seminole Tribe reaches actions brought pursuant to the Fair Labor Standards Act, and (2) whether the State of Wisconsin has waived its Eleventh Amendment immunity with respect to such actions.

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No. 95-586

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OCTOBER TERM, 1995

STATE OF WISCONSIN, ET AL., PETITIONERS

v.

GERALD R. MUELLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE FOR THE FEDERAL RESPONDENTS TO PETITIONERS' MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE OPINION AND DECISION FOR WANT OF JURISDICTION

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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STATEMENT

This suit was filed by state employees (the Mueller respondents) against the State of Wisconsin and various state officials and agencies (petitioners). The Mueller respondents alleged that petitioners had violated the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (FLSA), by failing to pay them overtime compensation. See Gov't Br. in Opp. 6-7. The FLSA expressly authorizes employees to sue state entities for violations of the FLSA. 29 U.S.C. 216(b) (a suit under the FLSA may be brought against any employer, including a "public agency"); 29 U.S.C.

203(e)(2)(C) (public agency includes "a State [or] political subdivision of a State").

The district court dismissed the suit, holding that the disciplinary deduction component of the Secretary of Labor's salary basis test for determining whether employees are exempt from overtime requirements is invalid as applied to public employees. Gov't Br. in Opp. 7-10. The court of appeals reversed and remanded, holding that the disciplinary deduction rule is valid as applied to public employees. *Id.* at 10-13. Petitioners filed a petition for a writ of certiorari seeking review of that ruling, and that petition is pending before this Court. As we explain in our brief in opposition (at 13-26), we do not believe that the question of the validity of the Secretary's regulations in this setting warrants review by this Court. Although the Court had granted certiorari in *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114 (1996), when petitioners filed their petition for a writ of certiorari in this case, their petition did not present any question concerning Congress's power to subject the States to suit under the FLSA. Nor had petitioners raised that question at any stage of the litigation prior to filing their petition for a writ of certiorari.

Since the filing of the certiorari petition, this Court issued its decision in *Seminole Tribe*. Petitioners now request that the Court grant their petition and vacate the decision below in light of *Seminole Tribe*.

DISCUSSION

In *Seminole Tribe*, the Court held that Congress lacks authority under the Indian Commerce Clause to abrogate a State's immunity from suit in federal

court. 116 S. Ct. at 1119. The Court concluded that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 1131. The Court acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), had held that Congress has power under the Interstate Commerce Clause to abrogate a State's immunity from suit. 116 S. Ct. at 1125. The Court concluded, however, that "the result in *Union Gas* and the plurality's rationale depart from [the] established understanding of the Eleventh Amendment and undermine the accepted function of Article III." *Id.* at 1128. The Court therefore overruled *Union Gas*. *Ibid.*

Seminole Tribe significantly alters the constitutional analysis applicable in determining whether Congress has authority to subject the States to suit. Accordingly, following *Seminole Tribe*, this Court has granted certiorari, vacated the judgment below, and remanded for further consideration in light of *Seminole Tribe* in several cases in which the court of appeals had upheld Congress's power to abrogate the States' Eleventh Amendment immunity. See *e.g.*, *University of Houston* v. *Chavez*, No. 95-851 (May 13, 1996) (Copyright and Lanham Acts); *Ohio Agricultural Commodity Depositors Fund* v. *Mahern*, 116 S. Ct. 1411 (1996) (Bankruptcy Code). The Court might choose to follow a similar course here.

In this case, however, because petitioners did not assert below that they were immune from suit under the Eleventh Amendment, the court of appeals did not address that question. The court of appeals held only that the Secretary of Labor's regulations are valid as

applied to public employees, and it remanded for a determination of the merits of the Mueller respondents' suit. That interlocutory ruling does not foreclose petitioners from asserting on remand in the district court that they are immune from suit in light of *Seminole Tribe*. Indeed, before filing the instant motion to vacate in this Court, petitioners filed in the district court a motion to dismiss in light of *Seminole Tribe*, and the district court has directed the parties to file briefs on that issue. If the Court denies the petition for a writ of certiorari, which raises only the question of the validity of regulations issued by the Secretary of Labor, the question of petitioners' Eleventh Amendment immunity from suit will be litigated in the district court in the first instance, on petitioners' pending motion to dismiss. In ruling on that motion, the district court will be free to consider whether Congress has authority to subject the States to suit under the FLSA, as well as whether petitioners have waived their immunity from suit.

CONCLUSION

The motion to grant the petition for a writ of certiorari and vacate the judgment of the court of appeals for want of jurisdiction should be denied, and the petition for a writ of certiorari should be denied. In the alternative, the Court may wish to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Seminole Tribe*.

Respectfully submitted.

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No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

REPLY ON MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE APPELLATE OPINION AND DECISION FOR WANT OF JURISDICTION

PROPRIETY OF REPLY

Because the federal courts never obtained subject matter jurisdiction (Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124-28, 1131-32 (1996)), the State defendants moved to grant a writ of certiorari and to vacate the appellate opinion and decision. Plaintiffs erroneously declare it "a fact that the State of Wisconsin

has expressly waived its sovereign immunity with respect to actions for overtime wages brought pursuant to the provisions of the Fair Labor Standards Act. §§ 109.01(2), 109.01(3), 109.03(5), 103.01(1)(b), 103.02, Wis. Stats. and Ind. §§ 74.01(4), 74.015, 74.08 Wis. Adm. Code." (Plaintiff's Opposition to Motion, p. 2.)[1] Replies on motions are permitted. Stern *et al.*, Supreme Court Practice, § 16-7, p. 642, n.6 (7th ed. 1993). The State defendants now correct this misstatement.

NO CONSENT TO FLSA SUITS

Through a complicated set of citations, plaintiffs assert the Wisconsin Legislature authorized suit against the State in federal court under the FLSA. Close examination of these citations belies the assertion.

The purpose of ch. 109, Wis. Stats., is not to grant employes a court forum to assert disputed FLSA claims but instead to assure the prompt payment of wages indisputably owed. *E.g.*, Employees Local 2901 v. Brown County, 140 Wis. 2d 850, 854, 412 N.W.2d 167 (Ct. App. 1987), *aff'd*, 146 Wis. 2d 728, 432 N.W.2d 571 (1988); Kenosha Fire Fighters v. City of Kenosha, 168 Wis. 2d 658, 665, 484 N.W.2d 152 (Ct. App. 1992) (purpose to "obtain prompt payment of *wages which are due*"), italics in original; Massachusetts v. Morash, 490 U.S. 107, 109, n.2 (1989) (listed as "wage payment" statute). If payment of these wages is delayed, both civil and criminal penalties may be imposed. § 109.11(2) and (3), Wis. Stats.

The Wisconsin Legislature, in allowing employes to seek "civil penalties" in "court" (§§ 109.03(5) and 109.11(2), Wis. Stats.), plainly meant Wisconsin circuit

---

[1]The cited regulations are now in Wis. Admin. Code ch. ILHR 274. Applicable Wisconsin statutory and regulatory provisions, are made part of an Appendix to this reply.

court. *See* references to "circuit court" in §§ 109.09(1), 109.09(2), 109.11(1)(c), 109.11(2)(a), 109.11(2)(b), Wis. Stats. No reference is made to federal courts. Like other state law claims, federal jurisdiction would not derive from the State statute itself. *E.g.*, Jackman v. WMAC Investment Corp., 610 F.Supp. 290 (E.D.Wis. 1985) (diversity jurisdiction), *aff'd*, 809 F.2d 377 (7th Cir. 1987); Henne v. Allis-Chalmers Corp., 660 F.Supp. 1464, 1483 (E.D.Wis. 1987) (pendent jurisdiction).

It is unlikely the Legislature authorized civil and criminal "penalties" to be imposed on the State itself even to enforce, in Wisconsin circuit court, the wage payment requirements of ch. 109, Wis. Stats. *E.g.*, State v. P.G. Miron Construction Co., Inc., 181 Wis. 2d 1045, 1052-53, 512 N.W.2d 499 (1994), *reconsideration denied* (intent to consent to State court action against State must be clear and express). If that were the legislative intent, Eleventh Amendment immunity against federal court actions would not be diminished since State legislatures must clearly and expressly consent to suit in "'*federal court*.'" *E.g.*, Port Authority Trans-Hudson v. Feeney, 495 U.S. 299, 305-306 (1990), italics in original.

Court actions under ch. 109, Wis. Stats., differ from FLSA court actions. Even the Wisconsin agency authorized to enforce the state statute lacks power to seek "liquidated damages" -- standard in FLSA lawsuits (*e.g.*, Walton v. United Consumers Club, Inc., 786 F.2d 303, 309 (7th Cir. 1986), *rehearing and rehearing en banc denied*) -- because those damages are not among the wages recoverable. DILHR v. Coatings, Inc., 126 Wis. 2d 338, 344-45, 376 N.W.2d 834 (1985). *See* § 109.11, Wis. Stats.

The civil penalty actions allowed employes by Ch. 109, Wis. Stats., are wholly unrelated to the FLSA. Plaintiffs try to make a connection by citing a different statutory scheme, §§ 103.01 to 103.03, Wis. Stats. (*cf.* Erdman v. Jordan, 181 Wis. 2d 736, 749, n. 6, 512 N.W.2d

487 (1994)) (recognizing Chs. 103 and 109, Wis. Stats., create two different schemes) and Wisconsin agency regulations adopted under that scheme. Wis. Admin. Code §§ ILHR 274.04 and 274.08. The authority for the regulations is "s. 103.01(1), Stats.," not Ch. 109, Wis. Stats. Wis. Admin. Code § ILHR 274.015. Other regulations confirm that Ch. 109, Wis. Stats., and Wis. Admin. Code ch. ILHR 274 impose distinct requirements. Wis. Admin. Code § ILHR 277.07(2) (noting distinction between "meet[ing] the requirements of the . . . Wisconsin labor standards laws applying to the payment of . . . overtime, ch. ILHR 274, and complying with the wage payment and collection law, ch. 109, Stats.").

Like the FLSA, §§ 103.01 to 103.03, Wis. Stats., controls the maximum "hours of labor" employes may be required to work and authorizes a Wisconsin agency to determine when overtime pay must, under **Wisconsin** law, be paid by employers. §§ 103.01 to 103.03, Wis. Stats. Employes are not authorized to enforce these State overtime requirements even in Wisconsin circuit court. § 103.02, Wis. Stats. They must file complaints with a Wisconsin agency authorized to investigate and issue orders. *Id.* The sole court action an employe may pursue is to challenge those agency orders in circuit court through limited judicial review procedures. *Id.*

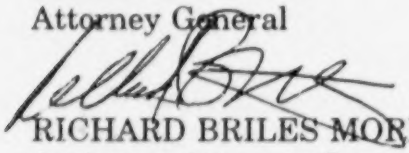
Only the agency may seek judicial enforcement of its orders. §§ 101.02(5)(f) and 103.02, Wis. Stats. In doing so, that agency can pursue the "penalties" in § 109.11, Wis. Stats., against private employers who violate the overtime requirements in Wis. Admin. Code § ILHR 274.03, court "penalties" under § 109.11, Wis. Stats. Wis. Admin. Code § ILHR 274.07. The agency may not pursue those "penalties" against public employers because Wis. Admin. Code § ILHR 274.03 does not apply to public employers. Wis. Admin. Code § ILHR 274.08(2).

The Wisconsin overtime regulations establish separate standards for public employes by tracking some FLSA standards while, by omission, excluding other FLSA standards. Wis. Admin. Code §§ ILHR 274.04 and 274.08. Ironically, 29 C.F.R. § 541.118, an interpretation of general application rather than a regulation specific to government employment (*e.g.*, Klein v. Rush Presbyterian-St.Lukes, 990 F.2d 279, 283, 285 (7th Cir. 1993)), is **not** on the short list of FLSA materials Wisconsin uses to apply §§ 103.01 to 103.03, Stats., to public employes. Wis. Admin. Code § ILHR 274.08(2) (accepting, as standards for exempt status of public employes, only the FLSA itself, 29 C.F.R. Part 553 and other "regulations" specifically related to state and local governments). The State overtime structure, though similar to the FLSA, stands separate from it and precludes private causes of action.

The citations presented by plaintiff can not be construed as a clear and express legislative surrender of Eleventh Amendment immunity allowing federal court lawsuits against the State of Wisconsin under the FLSA.

Respectfully submitted,

JAMES E. DOYLE
Attorney General



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APPENDIX

WISCONSIN STATUTES

Section 101.02(5)(f), Wisconsin Statutes, provides, in relevant part:

> (f) Upon the request of the department [of industry, labor and human relations], the department of justice or the district attorney of the county in which any investigation . . . had under ss. 101.01 to 101.25 is pending, shall aid therein and prosecute under the supervision of the department [of industry, labor and human relations], all necessary actions or proceedings for the enforcement of those sections and all other laws of this state relating to the protection of life, health, safety and welfare, and for the punishment of all violations thereof.

Chapter 103, Wisconsin Statutes, provides, in relevant part:

CHAPTER 103 EMPLOYMENT REGULATIONS

> **103.01 Hours of labor; definitions.** In ss. 103.01 to 103.03:
>
> **(1)** . . .
>
> (b) "Employer" includes the state [and entities of the state].
>
> . . .
>
> **103.02 Hours of labor. . . .** The department [of industry, labor and human relations] shall investigate, ascertain, determine and fix such reasonable classification, and promulgate rules fixing a period of time, or hours of beginning and

ending work during any day, night or week, which shall be necessary to protect the life, health, safety or welfare of any person, or to carry out the purposes of ss. 103.01 to 103.03. The department shall, by rule, classify such periods of time into periods to be paid for at regular rates and periods to be paid for at the rate of at least one and one-half times the regular rates. Such investigations, classifications and orders shall be made pursuant to the proceeding in ss. 101.01 to 101.25 which are hereby made a part hereof, so far as not inconsistent with ss. 103.01 to 103.03, and every order of the department shall have the same force and effect as the orders issued under ss. 101.01 to 101.25 and the penalties therein shall apply to and be imposed for any violation of ss. 103.01 to 103.03. Such orders shall be subject to review in the manner provided in ch. 227 [providing for judicial review of agency orders]. . . .

103.025 Hours of labor; compensatory time.

. . .

(2) An employer described in s. 103.01 (1)(b) may provide an employe, in lieu of overtime compensation, compensatory time off as permitted under 29 USC 207 (o), as amended to April 15, 1986.

103.03 Violations; penalty. . . . Every day for each person employed, and every week for each person employed, during which any employer fails to observe or to comply with any order of the department, or to perform any duty enjoined by ss. 103.01 to 103.03, shall constitute a separate offense.

Chapter 109, Wisconsin Statutes, provides, in relevant part:

CHAPTER 109 WAGE PAYMENTS, CLAIMS AND COLLECTIONS

109.01 Definitions. As used in this chapter:

(1) "Department" means the department of industry, labor and human relations.

(2) Except as provided in s. 109.07(1)(d), "employer" means any person . . . including the state and its political subdivisions . . . . .

(3) "Wage" or "wages" mean remuneration payable to an employe for personal services, including salaries, commissions, holiday and vacation pay, overtime pay, severance pay or dismissal pay, supplemental unemployment compensation benefits when required under a binding collective bargaining agreement, bonuses and any other similar advantages agreed upon between the employer and the employe or provided by the employer to the employes as an established policy.

(4) "Wage deficiency" means the difference between the amount required by law to be paid and the amount actually paid to an employe.

109.03 When wages payable; pay orders.

(1) REQUIRED FREQUENCY OF PAYMENTS. Every employer shall as often as monthly pay to every employe engaged in the employer's business, [with exceptions], all wages earned by such employe to a day not more than 31 days prior to the date of such payment. . . . [with further exceptions]

. . .

(5) ENFORCEMENT. Except as provided in sub. (1), no employer may by special contract with employes or by any other means secure exemption from this section. Each employe shall have a right of action against any employer for the full amount of the employe's wages due on each regular pay day as provided in this section and for increased wages as provided in s. 109.11(2), in any court of competent jurisdiction. An employe may bring an action against an employer under this subsection without first filing a wage claim with the department under s. 109.09 (1). An employe who brings an action against an employer under this subsection shall have a lien upon all property of the employer, real or personal, located in this state as described in s. 109.09(2).

. . .

109.09 Wage claims, collection.

(1) . . . The department shall enforce this chapter and . . . [s.] 103.02, ... In pursuance of this duty, the department may sue the employer on behalf of the employe to collect any wage claim or wage deficiency and ss. 109.03 (6) and 109.11 (2) and (3) shall apply to such actions. . . . [T]he department may refer such an action to the district attorney of the county in which the violation occurs for prosecution and collection and the district attorney shall commence an action in the circuit court having appropriate jurisdiction. . . .

(2) . . . A lien under this subsection takes effect when the department or employe files a verified petition claiming

the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed pays the fee specified in s. 814.61 (5) to that clerk of circuit court and serves a copy of that petition on the employer by personal service in the same manner as a summons is served under s. 801.11 or by certified mail with a return receipt requested. . . .

109.11 Penalties.

(1) . . .

(c) If an employer does not agree to compromise and settle a wage claim under this subsection, the department may refer the wage claim to a district attorney under s. 109.09 (1) or to the department of justice under s. 109.10 (3) for commencement of an action in circuit court . . . .

(2) CIVIL PENALTIES. (a) In a wage claim action that is commenced by an employe [before agency proceedings are completed], a circuit court may order the employer to pay to the employe, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50% of the amount of wages due and unpaid.

(b) In a wage claim action that is commenced after [agency proceedings are completed], a circuit court may order the employer to pay to the employe, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 100% of the amount of wages due and unpaid.

(3) CRIMINAL PENALTIES. Any employer who, having the ability to pay,

fails to pay the wages due and payable as s provided in this chapter or falsely denies the amount or validity thereof or that such wages are due, with intent to secure any discount upon such indebtedness or with intent to annoy, harass, oppress, hinder or defraud the person to whom such wages are due, may be fined not more than $500 or imprisoned not more than 90 days or both. Each failure or refusal to pay each employe the amount of wages due at the time, or under the conditions required in this chapter constitutes a separate offense.

WISCONSIN REGULATIONS

Wisconsin Administrative Code Chapter ILHR 274 provides, in relevant part:

Chapter ILHR 274 HOURS OF WORK AND OVERTIME

ILHR 274.01 Definitions.

. . .

(4) "Overtime" means hours in excess of 40 hours of work per week. . . .

ILHR 274.015 Applicability of chapter. Pursuant to s. 103.01 (1), Stats., [these regulations are adopted].

ILHR 274.03 Overtime pay. Except as provided in s. [ILHR 274.08], each employer subject to this chapter shall pay to each employe time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week.

ILHR 274.04 Exemptions. Except as provided in s. ILHR 274.08, each employer

subject to ch. ILHR 274 shall be exempt from the overtime pay requirements in s. ILHR 274.03 and these exemptions shall be interpreted in such a manner as to be consistent with the Federal Fair Labor Standards Act and the Code of Federal Regulations as amended, relating to the application of that act to all issues of overtime in respect to the following employes:

[detailed definitions of meaning of criteria for exemptions.]

. . .

ILHR 274.07 Penalties. Any employer who violates order s. ILHR 274.02, 274.03 or 274.06 shall be subject to the penalties provided in ss. 101.02 and 109.11, Stats. Each day of violation shall constitute a separate and distinct offense.

ILHR 274.08 Coverage of public employes.

(1) This section applies to employes of the state, its political subdivisions, and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(2) The provisions of ss. ILHR 274.03 through 274.06 regarding overtime pay, exemptions, and records shall not be applicable to employes identified in sub. (1). The provisions applicable to employes identified in sub. (1) shall be the provisions of the federal Fair Labor Standards Act, 29 CFR Part 553, the regulations of the U.S. department of labor relating to the

application of the Act to employes of state and local governments, and other federal regulations relating to the application of the Act to overtime issues affecting employes of state and local governments.

No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *et al.*,

Petitioners,

vs.

GERALD R. MUELLER, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The "salary basis test" was developed by the Department of Labor, pursuant to express congressional delegation, as one aspect of the definition of the executive, administrative and professional exemptions to the Fair Labor Standards Act. Its rationale has been repeatedly re-examined in response to comments received from the private and public sectors. In 1992, the Department of Labor adopted a final rule providing special limited accommodations for application of the salary basis test to public employers. The State of Wisconsin argues that the rule should provide greater accommodation than that provided by the informed rulemaking authority of the Department of Labor.

The question presented is:

> Must 29 C.F.R. § 541.118(a)(5), which was promulgated pursuant to the rulemaking authority of the Department of Labor, be invalidated to accommodate the policies and practices of the State of Wisconsin?

LIST OF PARTIES

Respondents concur with Petitioners' List of Parties with the following correction:

Ronald J. Strak was omitted from Petitioners' List of Parties. Mr. Strak consented to become a party plaintiff on January 3, 1993 and said consent was filed with the District Court on January 14, 1993.

Richard E. Stark was included in Petitioners' List of Parties. Mr. Stark withdrew his consent to become a party plaintiff on May 17, 1993.

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OPINIONS BELOW

Respondents concur with Petitioners' statement of the Opinions Below.

STATEMENT OF JURISDICTION

Respondents concur with Petitioners' jurisdictional statement.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

There are no constitutional provisions relevant to the issue presented by this case. The federal statutes involved are: 29 U.S.C. § 203; 29 U.S.C. § 204(a)(f); 29 U.S.C. § 207(a)(1); and 29 U.S.C. § 213(a). App. 51-52, Resp. App. 10a. The federal regulations involved are; 29 C.F.R. § 541.1; 29 C.F.R. § 541.2; 29 C.F.R. § 541.3; 29 C.F.R. § 541.118(a)(5) and 29 C.F.R. § 541.5d (1992). App. 56-60, 66.

Additional relevant material is contained in Respondents' Appendix (S. Ct. Rule 14.1(k)(v)). This includes: a January 15, 1986 USDOL Letter Ruling (Resp. App. 1a-4a); a January 9, 1987 USDOL Letter Ruling (Resp. App. 5a-6a); an August 17, 1995 WisDOT E-Mail News Bulletin (Resp. App. 7a); and an excerpt from 131 Cong. Rec. S14047-48 (Statement of Sen. Metzenbaum) (Resp. App. 8a-9a).

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners initiate their Statement of Facts with the comment that "the factual findings of the district court are

undisputed." While this statement is not wholly inaccurate, it must be noted that many of the findings of the District Court included in its findings of fact were actually conclusions of law which were both implicitly and explicitly reversed by the Seventh Circuit Court of Appeals.[1]

On December 3, 1992, Respondents brought the present action against Petitioner State of Wisconsin and its named agencies and employees to recover unpaid overtime compensation, liquidated damages and reasonable counsel fees under the provisions of the Fair Labor Standards Act.

It is undisputed in the record that Respondents have been subject to unpaid disciplinary suspensions of less than one work week for infractions of rules other than safety rules of major significance, and that such suspensions have actually been imposed on members of the plaintiff class during the time periods relevant to this action. It is also not disputed that the imposition of such non-safety related unpaid suspensions is inconsistent with the Department of Labor's salary basis test, and is a conclusive indicator that the plaintiff class is entitled to the protections afforded by the Fair Labor Standards Act. App. 5, 31, 111, 115-117. *See, e.g., Klein v. Rush Presbyterian - St. Luke's*, 990 F.2d 279, 285 (7th Cir. 1993); *Avery v. City of Talladega*, 24 F.3d 1337, 1341-42 (11th Cir. 1994).

The District Court expressly recognized that the imposition

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1. Specifically, Petitioners refer to the District Court's "findings of fact" that "[d]ifferentiating discipline between employes because they are exempt or nonexempt would undermine the validity of the discipline, violate Wisconsin's labor relations laws, create dissension and morale problems among its work force and violate its employees' state and federal constitutional rights . . ." Petition at 3-4, *citing* App. 16. (Respondents adopt Petitioners' Appendix for reference herein as "App.-__." Respondents' Appendix shall be referred to herein as "Resp. App.-__.")

of non-safety related unpaid disciplinary suspensions of less than one week was inconsistent with Department of Labor Regulations — and Seventh Circuit authority interpreting such regulations — defining the narrow professional, executive and administrative exemptions to the Fair Labor Standards Act. App. 31. Despite this recognition, and without citation, the District Court then proceeded to invalidate federal law to accommodate the State of Wisconsin's disciplinary policies and practices. The District Court reached this unsupported conclusion by finding that it would be inconsistent with congressional intent to apply that portion of the salary basis test contained in 29 C.F.R. § 541.118(a)(5) to the public sector. App. 34-35.

The Seventh Circuit Court of Appeals reversed. The Court of Appeals first stated that the regulation at issue (29 C.F.R. § 514.118(a)(5)) was one promulgated pursuant to express congressional delegation, and therefore, need only be rationally related to the objectives of the Fair Labor Standards Act. App. 5. *(Citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45). After concluding that § 541.118(a)(5) "easily" passed this liberal test, the Court of Appeals held that the State of Wisconsin's articulated policy and **demonstrated practice** of imposing unpaid suspensions inconsistent with 29 C.F.R. § 541.118(a)(5) conclusively established that the plaintiff class was entitled to overtime compensation in accordance with the mandates of the Fair Labor Standards Act.[2] The Court of Appeals expressly rejected the State

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2. In its Petition, the State of Wisconsin stated that "[t]he court of appeals found Wisconsin forfeited the exemption as to all of the engineers simply by asserting it reserved the right to impose suspensions for periods other than for full workweeks for infractions other than safety rules of major significance." Petition at 5, *citing to* App. 5 and 8. This is misleading. The holding of the Court of Appeals was based on the undisputed factual finding that such suspensions had actually been imposed on the Plaintiff class. App. 5,

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of Wisconsin's argument that the public employers were "compelled" to impose this narrow range of discipline on all State employees. App. 7.

The real issue presented by this petition is whether the State of Wisconsin must pay its employees in accordance with the mandates of federal law, or whether federal law must be modified to accommodate the policies and practices of the State of Wisconsin.

B. History

In *Garcia v. San Antonio*, 469 U.S. 528 (1985), this Court held that Congress had contravened no affirmative limit on its power under the Commerce Clause in affording public sector employees the protections of the wage and hour provisions of the FLSA. In so holding, this Court stated that:

> we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or **violative of any constitutional provision.**

Id. at 554 (emphasis added).

Following the *Garcia* decision, Congress passed the Fair Labor Standards Amendments of 1985, which provided a

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31. This case does not present a question of whether the mere articulation of a policy is enough to forfeit the exemptions, as Petitioners seem to imply. It would be improper for this court to grant a petition on the basis of facts not before the court. *See* S.Ct. Rule 14.1(g).

temporary adjustment period affording public sector employers the opportunity **"to achieve full compliance with the requirements of the law."** 131 Cong. Rec. S14048 (October 24, 1985) (statement of Sen. Metzenbaum, principal co-sponsor of the bill; emphasis added). Resp. App. 8a-9a. These Amendments also made certain special accommodations for public employers allowing for the payment of overtime with compensatory time in lieu of cash wages, made special rules for volunteers in the public sector and added a provision eliminating public employer liability for periods prior to the *Garcia* decision. *See* Pub. L. 99-150, 99 Stat. 787 (1985). This was the full scope of accommodation that Congress provided for the public sector.

29 U.S.C. § 213(a)(1) provides for the exemption of executive, administrative and professional employees from the minimum wage and overtime provisions of the FLSA as follows:

> **§ 213(a) Minimum wage and maximum hour requirements**. The provisions of sections 6 ... and 7 ... shall not apply with respect to —
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> > (1) **any employee** employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act . . .). (emphasis added).

App. 52.

The FLSA charges the Secretary of Labor with responsibility to define and delimit the executive, administrative,

and professional exemptions to the FLSA.[3] The Department's regulations defining these exemptions have the force and effect of law. *Batterton v. Francis*, 432 U.S. 416, 425 (1977). The Department's regulations, promulgated pursuant to the rulemaking procedures of the Administrative Procedure Act, set forth separate tests for the professional, administrative and executive exemptions from the wage and hour provisions of the FLSA. Each test contains a set of criteria which must be satisfied to qualify for the exemption, and the courts have uniformly held that an employee must satisfy all of the applicable criteria to qualify. *Wirtz v. C & P Shoe Corp.*, 336 F.2d 21 (5th Cir. 1964); *Wirtz v. Williams*, 381 F.2d 613 (5th Cir. 1967); *Klein v. Rush Presbyterian - St. Luke's*, 990 F.2d 279 (7th Cir. 1993) (hereinafter "Klein").

Common to each of the executive, administrative and professional exemptions is the requirement that an employee be compensated on a "salary basis." *See* 29 C.F.R. §§ 541.1 - 541.3, App. 56-58. The regulations defining "salary basis" provide that an employee will be considered to be compensated on a salary basis if the employee

> . . . regularly receives each pay period a

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3. Petitioners discuss at length the manner in which the FLSA has been administered to federal employees by Civil Service Commission (CSC) and its successor, Office of Personnel Management (OPM). This discussion is irrelevant. The law is clear that the Agency responsible for the administration of the FLSA to State and Local governments is the United States Department of Labor. *See* 29 U.S.C. §§ 204(a), (f) and 213(a)(1). The delegation of authority to CSC was a delegation which explicitly covered **only** its application to the federal government; it left administration of the FLSA regarding **all other covered entities** to the Department of Labor. 29 U.S.C. § 204(f). *See, e.g., American Federation of Government Employees v. OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987); *Ahern v. State of New York*, 807 F. Supp. 919, 922 n.4 (N.D. N.Y 1992), *aff'd*, 3 F.3d 581 (2d Cir. 1993), *cert. denied.*, 114 S. Ct. 1187 (1994).

> predetermined amount constituting all or part of the employee's compensation, and the predetermined amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to specified exceptions, the employee must receive the full salary for any week in which any work is performed, without regard to the number of days or hours worked . . .

29 C.F.R. § 541.118. App. 66.

Under the regulations, an employee who is subject to unpaid disciplinary suspensions of less than one week for infractions of rules other than safety rules of major significance is entitled to the wage and overtime protections of the Fair Labor Standards Act. App. 66-68, 115-117. *See, e.g., Klein v. Rush Presbyterian - St. Luke's*, 990 F.2d 279, 285 (7th Cir. 1993); *Avery v. City of Talladega*, 24 F.3D 1337, 1341-42 (11th Cir. 1994).[4]

On November 19, 1985, the Department of Labor published in the Federal Register (50 Fed. Reg. 47696) an advance notice of proposed rulemaking requesting the views of the public on **any changes they felt were necessary in 29 C.F.R. § 541**. App. 83-84. The notice specifically solicited comments on suggested

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4. Petitioners make the disingenuous argument that § 541.118(a)(5) regards all non-safety related suspensions, even those issued for more than one week, as inconsistent with salaried status. Petition at 7. No court, administrative interpretation or administrative regulation of which Respondents are aware has ever made a finding consistent with this assertion. It has been uniformly held that the only unpaid suspensions inconsistent with salaried status are those of less than one week issued for nonsafety related infractions. App. 6, 30, 116-117. Further, it is undisputed that the facts before this Court only involve unpaid suspensions of less than one week issued for non-safety related infractions. *Id.*, App. 17.

changes to the "salary basis test", and asked the public to comment on whether the Department should provide any special accommodations to public sector employers. 50 Fed. Reg. 47697, App. 84. *See also* 57 Fed. Reg. 37668, App. 95.

In January 1986 (during the course of the temporary adjustment period), the Department of Labor began receiving inquiries from public sector employers regarding application of the salary basis test to its employees. January 1986 USDOL Letter Ruling. Resp. App. 1a-4a. During this period, the Department clearly indicated that the salary basis test was entirely applicable to the public sector. *Id.*

The Department of Labor received a number of comments from public employers responding to its advance notice of proposed rulemaking.[5] In response to these comments, in January of 1987, the Department of Labor adopted a non-enforcement policy with respect to the application of certain aspects of the salary basis test to public sector employers while consideration was being given to proposed changes in the regulations. This nonenforcement policy **did not** suspend application of § 541.118(a)(5) to public sector employers. January 1987 USDOL Letter Ruling. Resp. App. 5a-6a. *See, e.g., Kinney v. District of Columbia*, 994 F.2d 6, 9 (D.C. Cir. 1993); *Yourman v. Dinkins*, 826 F. Supp. 736, 746 (S.D.N.Y 1993).

On September 6, 1991, the Department of Labor adopted an interim final regulation providing certain limited exceptions to the application of the salary basis test to public sector employers, and solicited additional comments for the preparation of any final

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5. The Department of Labor also acknowledged receipt of comments requesting exceptions to application of the salary requirement in response to proposed regulations issued to implement the 1985 FLSA amendments. 57 Fed. Reg. 37662.

rule the Department of Labor considered appropriate. 56 Fed. Reg. 45825, App. 91. The interim final rule **did not** suspend application of 29 C.F.R. § 541.118(a)(5) to the public sector. *Id. See, e.g., Bankston v. State of Illinois*, 60 F.3d 1249, 1253 (holding that interim rule did not suspend application of § 541.118(a)(5) to public sector).

On August 19, 1992, the Department of Labor adopted its final regulation at 29 C.F.R. § 541.5d providing a "special, limited exception from the exemption's requirement for payment 'on a salary basis' . . . for certain public sector pay systems that reduce the pay of otherwise-exempt employees for partial-day absences . . ." 57 Fed. Reg. at 37666, App. 91. In its preamble to this final rule, the Department published and responded to various comments received in the rulemaking process. Among these comments was a request that § 541.118(a)(5) be eliminated from the exemption criteria for public sector employees:

> *Comment*: § 541.118(a)(5) regarding deductions for penalties imposed for infractions of safety rules of major significance should be broadened to include disciplinary suspensions of public sector employees.
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> * * *
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> In the Department's judgement, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule [§ 541.118(a)(5)]. Although contrary assertions were made, the comments failed to demonstrate that public employers are

> significantly more restricted in the availability of options with respect to employee discipline than private employers ... In addition, other remedies for disciplinary infractions, such as official reprimands, demotions and reassignment or restriction of duties, are generally available and used in the public sector.

57 Fed. Reg. 37674, App. 111.

The Department of Labor has taken many opportunities to reexamine the salary basis test and to specifically consider its application to the public sector. It has engaged in rulemaking for the express purpose of providing those accommodations that in the agency's informed discretion were appropriate. Through this entire process, the Department has been unwavering in its application of § 541.118(a)(5) to the public sector. The Department's regulations have never prohibited public sector employers from disciplining their employees in the manner they see fit. Section 541.118(a)(5) is merely one aspect of the test used to determine if employees fall within the ambit of one of the FLSA's narrow exemptions. 29 C.F.R. § 541.118(a), App. 66.

REASONS FOR DENYING THE WRIT

The State of Wisconsin's Petition does not meet any of this Court's criteria for granting review.

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS REGARDING THE ISSUE RAISED IN THE STATE OF WISCONSIN'S PETITION.

The State of Wisconsin argues that the decision of the Court of Appeals herein and the decision of the Ninth Circuit Court of Appeals, in *Service Employees International Union. Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994), "creates an indirect conflict in the circuits." Petition at 10. It would appear that the State's very articulation of the asserted conflict as "indirect" would constitute insufficient grounds to invoke this Court's discretionary exercise of its certiorari jurisdiction. *See e.g.*, R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993) at 168 [hereinafter cited as Stern] ("a square and irreconcilable conflict ... ordinarily should be enough to secure review"). Beyond the State's implicit recognition that its asserted conflict is questionable, the fact remains that there is complete uniformity between the circuits on the question before this Court.

The only issue before this Court is the validity of § 541.118(a)(5) as applied to the State of Wisconsin. *Service Employees, supra,* did not involve § 541.118(a)(5). The Ninth Circuit explicitly held that the salary basis test was validly applied to the public sector as it has existed since the interim final rule in September of 1991.[6] *Service Employees*, 35 F.3d 483, 489.

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6. Petitioners attempt to create an "indirect conflict" between the Ninth (Cont'd)

Since all versions of the salary basis test, including those expressly declared by the Ninth Circuit to be validly applied to the public sector, include § 541.118(a)(5) as an exemption criteria for both public and private sector employees, there is no conflict between the circuits.[7]

II.

THE STATE OF WISCONSIN'S PETITION DOES NOT RAISE ANY LEGITIMATE CONSTITUTIONAL ISSUES.

A. The Due Process Clause

The State of Wisconsin argues that it is required by the due process clause to impose progressive discipline on its employees and that, by definition, a system imposing progressive discipline **must** include **unpaid** disciplinary suspensions of less than one week for infractions of minor rules. This is a hollow and baseless assertion.

As Petitioners correctly noted, "progressive discipline seeks

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Circuit's broad articulation that the salary basis test was invalid prior to 1991 and the Seventh Circuit's holding that any part of the salary basis test not specifically addressed by the DOL's 1992 rulemaking was presumed valid. Petition at 11, fn. 2. Conflicts in dicta in distinguishable cases generally do not constitute sufficient grounds for granting a writ. Stern, *supra* at 355.

7. To the extent the State of Wisconsin argues there is an implicit conflict concerning the status of the salary basis test prior to September of 1991, this is a moot point. Given the statute of limitations governing FLSA actions (two years, or three years in the case of wilful violations), the time for filing actions under the pre-1991 rule has long since passed. Therefore, this implicit conflict need not be resolved. *See, e.g., United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 42 U.S. 932 (1952).

to rationally assess discipline appropriate to both the severity of the offending conduct and the history of the prior discipline." Petition at 18. Therefore, progressive discipline merely requires the imposition of discipline commensurate with the act being punished or discouraged. No particular type of discipline is required or prescribed by the concept and the salary basis test does not in any way limit the State's ability to impose discipline that is progressive in nature.

In response to a public employer's argument that it must be able to impose unpaid disciplinary suspensions, the court in *Pautlitz v. Naperville*, 781 F. Supp. 1368, 1373, n. 8 (N.D. Ill. 1992) stated:

> Naperville originally maintained that such power is essential to maintaining discipline in the force. While the threat of suspension without pay is certainly a deterrent to misconduct among any employee group, we are not completely convinced that it is the sole effective method. As we pointed out to counsel for Naperville, other effective deterrents may include the threat of demotion, failure to promote, lack of "merit pay" and unfavorable job assignments.

The Department of Labor reached the same conclusion as the *Pautlitz* court:

> In the Department's judgement, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule [§ 541.118(a)(5)]. Although contrary

> **assertions were made, the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers . . . In addition, other remedies for disciplinary infractions, such as official reprimands, demotions and reassignment or restriction of duties, are generally available and used in the public sector.**

57 Fed. Reg. 37674, App. 111.[8] (Emphasis added.)

Finally, the State's argument must fail because it is based on the faulty premise that "progressive discipline" is unique to public sector employment. Progressive discipline is as much a fact of private sector employment as it is in the public sector, and § 541.118(a)(5) has been applied to private sector employers since 1954.[9] Therefore, the fact that "progressive discipline" is

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8. It is ironic that the State's reaction to the Seventh Circuit Court of Appeals' decision herein was to modify its progressive disciplinary structure to simply not include unpaid disciplinary suspensions of less than one week for non-safety related infractions. WisDot E-Mail News Bulletin. Resp. App. 7a. This is the very option that the Seventh Circuit Court of Appeals said was available to the State, and which the State continues to argue in its Petition is not a viable option for them. App. 7.

9. In fact, collective bargaining contracts in both the public and private sectors typically provide that an employer have "just cause" for any discharge or discipline imposed. It is from such "just cause" provisions that the requirement for progressive discipline is derived. Elkouri & Elkouri, *How Arbitration Works*, 2nd ed. (BNA Publishing 1985) at 652. The private sector is required to have progressive disciplinary systems for professional employees governed by collective bargaining agreements or who otherwise have contracts

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employed by the State of Wisconsin does not provide any basis for distinguishing it from the private sector in the application of § 541.118(a)(5). There is no valid due process challenge to the validity of the salary basis test. *See, e.g., United States v. Darby*, 312 U.S. 100, 125 (1941) (rejecting a due process challenge to application of FLSA classifications).

B. The Equal Protection Clause

The State of Wisconsin has argued that utilizing unpaid suspensions for infractions other than "safety rules of major significance" as an exemption criteria will result in a system which imposes different penalties to individuals in state service on the basis of FLSA classification and that such a distinction would violate the Equal Protection Clause of the United States Constitution. Petitioners' argument raises no legitimate equal protection concerns.

This Court has clearly stated that litigants have a heavy burden in asserting an equal protection claim. In the absence of a law that distinguishes between classes on the basis of **suspect** (race, religion, national origin) or **quasi suspect** (gender or legitimacy) classifications, the party challenging the law must demonstrate that the classification bears **no rational relationship to a permissible government objective**. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61

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containing just cause provisions. In order for private sector employers to maintain FLSA exemptions of their professional, executive or administrative staff, they cannot subject them to unpaid disciplinary suspensions for infractions of rules other than safety rules of major significance. There is nothing in the concept of progressive discipline that requires the imposition of unpaid suspensions.

(1911); *see also, Peterson v. Lindner*, 765 F.2d 698, 705 (7th Cir. 1985) ("Only if a law is totally arbitrary will it fail.") J. Barron & C. Dienes, *Constitutional Law in a Nut Shell* (West Publishing 1991) at 206.

The State's assertion, therefore, contemplates that an individual would be able to successfully argue that compliance with federally mandated protective labor legislation bears no rational relationship to a permissible government purpose. This argument must clearly fail. *See, e.g., Carleton Screw Products Co. v. Fleming*, 126 F.2d 537, 541 (8th Cir. 1947) (FLSA classifications do not violate equal protection clause).

Congress' express purpose of providing broad federal protection with respect to the wages and hours of this country's labor force is clearly a permissible government purpose. *See, e.g., United States v. Darby*, 312 U.S. 100, 109-110 (1941). There is no good faith argument that the FLSA, or the regulations implementing the Act, bear no rational relationship to the achievement of that end.[10]

C. The Guarantee Clause

The State of Wisconsin suggests that utilizing § 541.118(a)(5) as an exemption criteria impedes the State's ability to maintain a republican form of government as guaranteed by the United States Constitution. This is quite a stretch.

Section 541.118(a)(5) is not a mandate; it is merely one aspect of the criteria developed by the Department of Labor to

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10. It would also follow under the State's argument that distinguishing in the payment of overtime at the federally mandated rate on the basis of FLSA exemption status would be inconsistent with the equal protection clause.

determine whether an employee falls into one of the narrow exemptions from the Fair Labor Standards Act. It is rather difficult to imagine how a criteria used to distinguish between exempt and non-exempt employees under the FLSA impedes a State's ability to maintain a republican form of government.

The FLSA specifically exempts from its coverage state and local employees who hold public elective office, have been appointed by an elected official to serve in a policy making capacity, serve on the personal staff of an elected official, advise an officeholder directly with respect to the constitutional or legal powers of that office, or work in the legislative branch of a state, political subdivision, or agency. 29 U.S.C. § 203(e)(2)(C). App. 51. Congress was mindful to exclude from coverage those State officials who exercised any of the powers of a republican government. *See, e.g., Garcia v. San Antonio*, 469 U.S. 528, 551 n.17 (1985).

The plaintiff employees at issue herein are engineers[11] who do not perform functions related to a republican form of government. The Seventh Circuit questioned appropriately "how the [guarantee] clause relates to the employment of engineers is in any event obscure." App. 7.

As one legal scholar has observed:

> Most state and local employees do not perform functions related to a republican form of government. School teachers, hospital orderlies, garbage collectors, bus drivers, and air traffic controllers do not exercise the lawmaking, adjudicatory, or

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11. Plaintiff class includes employees doing engineering work whether degreed and licensed or not.

> enforcement functions that characterize a republican government. Congress, therefore, may adjust the wages and hours of these and similar employees without diminishing the states' ability to conduct a republican form of government.

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 56 (1988). *See also*, Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 890 (1979); *Garcia*, 469 U.S. 528, 551 (1985) (The Constitution of the United States preserves the autonomy and independence of the States in their **legislative and judicial** departments).

Further, no authority cited by the Petitioners lends any support to its assertion that § 541.118(a)(5) exceeds some affirmative limit on the federal government's legislative authority under the Guarantee Clause. Section 541.118(a)(5) certainly does not run afoul of this Court's holding in *New York v. United States*, 112 S. Ct. 2408 (1992) that it is improper for Congress to compel the States to regulate in a given area; rather, § 541.118(a)(5) is an example of the congressional authority this Court **approved** of in *New York, supra*:

> . . . The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York, supra, at 2429.

The regulation at issue is not even a mandate, let alone a

requirement that the State of Wisconsin regulate in a given area. This Court's decision in *New York* lends no support to the State's arguments.

Petitioners further look for support in this Court's decision in *Gregory v. Ashcroft*, 501 U.S. __, 111 S. Ct. 2395 (1991). *Gregory* applied an axiom of legislative interpretation called "the plain statement rule": if a congressional statute intends to preempt the historic powers of the States, its intention must be unmistakably clear in the language of the statute. *Gregory*, 501 U.S. at __, 111 S. Ct. at 2401. *Gregory*'s plain statement rule is clearly satisfied here since the FLSA contains **a plain statement of congressional intent to cover public sector employers and employees under its terms**. 29 U.S.C. §§ 203(d)-(e), App. 51. *See, e.g., Biggs v. Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993); *Hale v. Arizona*, 993 F.2d 1387, 1391 (9th Cir. 1993) (*en banc*).[12]

The Seventh Circuit Court of Appeals properly concluded that there is nothing about the application of § 541.118(a)(5) as an exemption criteria to the plaintiff engineers that is inimical to the Guarantee Clause. App. 7.

D. Conclusion as to the State's Constitutional Arguments

The State of Wisconsin's "web of constitutional provisions"

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12. It is clear that the plain statement rule applies to coverage of the federal law, not application of administrative regulations administering the Act. *Moreau v. Klevenhagen*, 113 S. Ct. 1905, 1912 (1993) (discussing FLSA regulations applicable to State employers without reference to the "plain statement rule"); Craig Becker, *The Check Is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. Rev. 1241, 1272 n.157 (1993) ("*Gregory*'s plain statement requirement only makes sense as applied to questions of coverage. To place the same requirement on the content of federal regulations governing the states would require Congress to draft extraordinarily long and detailed statutes in order to effectively regulate the States.").

(Petition at 27) is little more than a smoke screen for the State's simple desire to avoid paying the plaintiff class in accordance with the mandates of federal law. The State argues that, under these mandates, it is **compelled** to issue unpaid suspensions of less than one week for minor, non-safety related infractions. This assertion is belied by the State's actions following the Seventh Circuit Court of Appeal's decision herein.

The State of Wisconsin could have changed its compensation practices to begin compensating the plaintiff class in accordance with the mandates of the FLSA. Instead, the State of Wisconsin modified the very disciplinary structure which it has so vehemently argued it is constitutionally compelled to maintain. Resp.App. 7a. In addition, it modified the disciplinary structure **only with respect to non-exempt employees**, thereby running into the teeth of the very "equal protection problem" about which the State professes to be so concerned. *Id.*

The State's constitutional arguments are so hollow even the State does not appear to believe them. This case presents no legitimate constitutional issues warranting review.

III.

THE STATE OF WISCONSIN'S PETITION DOES NOT RAISE ANY IMPORTANT FEDERAL STATUTORY ISSUES.

A. The Court of Appeals Applied the Proper Legal Standard in Addressing the State's Arguments Concerning the Validity of § 541.118(a)(5).

The State attempts to paint a picture of the Department of Labor as an agency derelict in performing its delegated function. The truth, however, is that the Department has exercised its

statutorily delegated rulemaking authority in a manner which is adverse to the interests of the petitioner. *See, e.g., Bethlehem Steel Corporation v. U.S. E.P.A.*, 782 F.2d 645, 655 (7th Cir. 1986) (holding that an agency's discretion in rulemaking includes the discretion as to whether or not to undertake rulemaking).

The weakness of the State's constitutional arguments — which lead the Seventh Circuit Court of Appeals to be rather dismissive in this regard — clearly reflect the State's awareness that it faces a formidable task in obtaining review of the substance of informed agency action. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45.

The State creatively argues that the salary basis test is an interpretation, not a regulation and therefore that § 541.118(a)(5) is not entitled to the high degree of deference accorded by the Court of Appeals.

Section 541.118(a)(5) was promulgated in accordance with the rulemaking procedures of the Administrative Procedures Act and pursuant to express congressional delegation at 29 U.S.C. § 213(a)(1). App. 52. *See also*, 19 Fed. Reg. 1321-22 (Mar. 9, 1954), App. 72-73. As this Court stated in *Batterton v. Francis*, 432 U.S. 416, 425 (1977):

> Unlike the statutory term in Title II, however, Congress expressly delegated to the Secretary [of Labor] the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for **interpreting** the statutory term. **In**

> **exercising that responsibility, the secretary adopts *regulations* with legislative effect.**

(Emphasis added.)

Batterton's teachings were echoed again by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the Statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

In the area of the executive, professional and administrative exemptions to the FLSA, the delegation to the Department of Labor could not be any clearer:

> **§ 213(a) Minimum wage and maximum hour requirements**. The provisions of sections 6 . . . and 7 . . . shall not apply with respect to —
>
> > (1) any employee employed in a bona fide executive, administrative, or professional capacity . . . **(as such terms are defined and delimited from time to time by regulations of the Secretary**, subject to the

> provisions of the Administrative Procedure Act . . .).

29 U.S.C. § 213(a)(1), App. 52.

The Court of Appeals acted properly in according § 541.118(a)(5) the deferential standard articulated by this Court in *Chevron*. *See, e.g., Walling v. General Industries, Co.*, 330 U.S. 545 (1947) (referring to the salary basis test as a regulation); *Avery v. City of Talladega*, 24 F.3d 1337, 1340 (11th Cir. 1994) (according *Chevron* deference to the Secretary's regulation at 541.118(a)(5)); *Service Employees International Union, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994) (same).[13] As noted by the Court of Appeals, § 541.118(a)(5) easily passes muster under the *Chevron* analysis. App. 5.

B. Arguments About Congressional Intent and Public Accountability

Petitioners, in an attempt to overcome the deferential standard of *Chevron*, argue that § 541.118(a)(5) is invalid because it is contrary to congressional intent. The State's implicit

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13. *Skidmore v. Swift*, 323 U.S. 134 (1944) urged by the Petitioners to be controlling did not involve agency regulation adopted through the rulemaking process and pursuant to express congressional delegation. Rather, it involved a bulletin and some informal rulings of the Administrator drafted in the absence of congressional delegation of authority to define the terms in dispute. While *Chevron* is clearly controlling under the current facts, the outcome of this case should be no different if *Skidmore* deference is applied. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("In an era when our treatment of agency positions is governed by *Chevron*, the 'legislative rule vs. other action" dichotomy of *Gilbert* [citation omitted] is an anachronism; and it is not even a correct description of that anachronism to say that *Gilbert* held that EEOC (as opposed to all agency action other than legislative rules) is not entitled to deference.").

reasoning is (1) that Congress could never have intended to violate the Constitution; and (2) Congress could never have intended to require the States to breach principles of public accountability.

Because there are clearly no constitutional concerns in application of § 541.118(a)(5) as an exemption criteria to public employers, the State's first argument warrants no further comment.

The State's musings about public accountability are rather difficult to fathom. Public accountability is rooted in the notion "that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds." 56 Fed. Reg. at 45825. App. 89. *See, e.g., Pautlitz v. Naperville*, 781 F. Supp. 1368, 1370 (N.D. Ill. 1992). The utilization of § 541.118(a)(5) as an exemption criteria does not have any discernable conflict with principles of public accountability. App. 6-7. Indeed, application of § 541.118(a)(5) is merely one of several factors considered in determining whether an employee fits into one of the narrow exemptions to the FLSA. The consequence of an employee not fitting into an exemption is that the employer must pay for the overtime work it receives. The FLSA does not require the employer to pay for something it does not receive. Hence, public accountability is maintained.

The State's historical perspective, while interesting, contributes no support for the State's petition. It is noteworthy that the historical examples provided address the imposition of suspensions without pay on elected and appointed officials. Petition at 20-21. Such persons are already expressly excluded from the FLSA's coverage. 29 U.S.C. § 203(e)(2)(C), App. 51.

In any event, the ability to impose unpaid disciplinary

suspensions has not been taken away from the States. They are free to do so for all employees. Section 541.118(a)(5) is simply one of the criteria used to distinguish between exempt and non-exempt employees under the FLSA. It is completely logical to provide that where, as in the facts before this Court, an employee can be docked a day's pay for leaving a meeting early, then he should also be paid overtime in those instances where attending the very same meeting would cause him to work hours in excess of 40.[14]

The State's musings that Congress never intended the salary basis test to apply to public sector employers is not persuasive nor does it overcome the *Chevron* deferential standard. Indeed, *Chevron* provides that such legislative regulations are given controlling weight unless they are "**manifestly** contrary to the statute." Section 541.118(a)(5) easily clears this hurdle.

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14. It is difficult to imagine that the president of the University of Wisconsin system would be suspended for one day without pay because he left a meeting early like Respondent Russell did in this case. Petition at 12. Indeed, the very absurdity of the State's example lends credence to the rationale of § 541.118(a)(5) as an aspect of the exemption criteria.

CONCLUSION

The State of Wisconsin attempts to invoke this Court's certiorari jurisdiction under every criteria governing the granting of petitions for review. It satisfies none of them. Displeasure with the state of federal law does not constitute a sufficient basis for invoking the jurisdiction of this Court.

The State's Petition should be denied.

Respectfully submitted,

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APPENDIX A — LETTER RULING FROM JANUARY 15, 1986

Letter Ruling: January 15, 1986 (no number assigned)

This is in response to your letter of July 30, with enclosure, in which you request our opinion as to whether _____ Counties, in the State of _____ are compensating their salaried employees "on a salary basis" that is in accordance with the salary requirement contained in section 541.118 of Regulations, 29 CFR Part 541. You specifically want to know whether, under section 541.118, deductions may be made from the salaries of such employees for absences of less than a day. We regret the delay in responding to your inquiry.

Your letter states that in _____ counties virtually all employees are paid on a salary basis. The employees earn sick leave under the sick leave plans of those counties, and use the sick leave on the basis of the hours they work. In a telephone conversation with a member of my staff on October 20, you clarified your inquiry by stating that you request our opinion with regard to the salary basis of payment for employees who would otherwise qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) as bona fide executive, administrative, or professional employees.

You state that where a salaried employee has accrued sufficient sick leave credits and, for example, misses four hours of scheduled work because of illness, the employee is charged for four hours of sick leave and his or her compensation is not affected. However, if such employee has exhausted all earned sick leave and misses four hours of scheduled work because of illness, the employee is docked for the four hours and his or her pay is reduced accordingly. You indicate that it may not be possible under _____ State law to advance sick leave to

employees. You believe that other States have similar problems in paying such employees their full salaries when they work partial days.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity as those terms are defined in the appropriate sections of Regulations, 29 CFR Part 541. One requirement for exemption is that the employee be paid "on a salary basis" as discussed in section 541.118.

Deductions which may be made from an employee's compensation without affecting the employee's salary basis of payment are found in sections 541.118(a)(2), (3), and (5). Deductions from the salary of an otherwise exempt employee which would affect the salary basis of payment are found in sections 541.118(a)(1) and (4).

As stated in section 541.118(a)(2), deductions may be made from the salary of an exempt employee when the employee is absent from work for a day or more days for personal reasons, other than sickness or accident. As stated in section 541.118(a)(3), deductions may also be made for absences of a day or more days occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy, or practice provides compensation for such absences, deductions for absences of a day or more days may be made before an employee has qualified under such plan, policy, or made before an employee has qualified under such plan, policy, or practice, and after the employee has exhausted the leave

allowance thereunder. However, deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3).

Therefore, in the example you provide where the employee is docked four hours and his or her pay is reduced accordingly, because the employee has exhausted his or her sick leave, the employee would not meet the criteria under 29 CFR Part 541 for exemption under section 13(a)(1) of FLSA.

Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

The Fair Labor Standards Amendments of 1985 (Public Law 99-150), which were enacted on November 13, 1985, change certain provisions of FLSA as they relate to employees of State and local governments. The amendments will be effective on April 15, 1986. Prior to that date, the Department of Labor (the Department) will issue regulations as may be required to implement this legislation. We have enclosed a summary of these amendments for your information.

We also wish to point out that on November 19 the Department published an Advance Notice of Proposed Rulemaking in the Federal Register (50 FR 47696) to obtain the views of the public on needed changes in Regulations, 29 CFR

Appendix A

Part 541. The Department is interested in the views of the public with respect to all aspects of the regulations. Comments will be received until January 21, 1986.

We trust the above information will be of assistance to you.

Sincerely,

/s/ Herbert J Cohen
Deputy Administrator

APPENDIX B — LETTER RULING FROM JANUARY 9, 1987

Letter Ruling: January 9, 1987 (no number assigned)

It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in section 541.118 or 29 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis which is contrary to the position in section 541.118 that deductions may be made only for absence(s) of a day or longer.

Revisions to the provisions of 29 CFR Part 541, including the salary tests, have been under consideration as indicated in the Advance Notice of Proposed Rulemaking (ANPR) published in the *Federal Register* on November 19, 1985 (50 FR 4769). The ANPR was published in order to obtain the views of the public on needed changes in the regulations. A commentor representing public employers has pointed out the problem described above and has proposed changes in section 541.118 that would allow deductions to be made for absence(s) of less that a day, or to eliminate the salary test entirely .

While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with

regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

If you have any questions concerning the above policy, please contact OPO, Branch of FLSA enforcement, at FTS 523-7043.

/s/ Paula V. Smith
Administrator

APPENDIX C — VOLUME 5 NO. 34, WISCONSIN DEPARTMENT OF TRANSPORTATION E-MAIL NEWS BULLETIN FROM THURSDAY, AUGUST 17, 1995

Vol. 5 No. 34 WisDot E-Mail News Bulletin
Thursday, August 17, 1995

* * *

DISCIPLINARY CHANGE. Beginning Monday (8/21), WisDOT will be following modified guidelines for disciplining employees who are exempt from the Fair Labor Standards Act provisions. As the result of a recent circuit court of appeals decision, progressive discipline guidelines will be: oral warning(s), written reprimand(s), 5-day suspension(s) without pay, suspensions without pay for two or more full work weeks, and termination. It may not be appropriate to follow this progressive model in all instances, since the level of discipline used depends on the circumstance of each situation. For example, it is possible that a situation would warrant a 5-day suspension even though the employee has never been previously disciplined. Contact CINDY MOREHOUSE (608/266-7023), SUE CHRISTOPHER (608/266-7460), BOB BARNES (608/266-7045), or JESSICA LA ROCQUE (608/266-2974) if you have questions. Sue Christopher (reporter).

* * *

APPENDIX D — EXCERPT FROM 131 CONG. REC. S14047-48 (STATEMENT OF SEN. METZENBAUM)

131 Cong. Rec. S14047-48 (October 24, 1985) (statement of Sen. Metzenbaum, principal co-sponsor of the bill; emphasis added).

> . . . 7 million State and local government employees deserve the protection of the FLSA. That protection has been afforded to workers in the private sector since the New Deal . . . State and local employees should not be treated as second class citizens.
>
> * * *
>
> This bill, which reflects the considerable efforts of many individuals, represents a fair and equitable compromise . . . It is significant that this compromise has been enthusiastically endorsed by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and the National Conference of State Legislators. These public employer groups have praised the bill as "provid[ing] a solution to the problems created by *Garcia* which is balanced and equitable to all parties. It maintains the principles of the Fair Labor Standards Act and at the same time recognizes the special circumstances faced by public employers and public employees.
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> * * *

Appendix D

The bill, S. 1570 as amended will give state and local governments the flexibility they need to operate without going into the red . . .

Finally by deferring enforcement of the FLSA overtime provisions until April 15, 1986 — 1 year after the *Garcia* decision — the bill provides ample time for State and local governments that have not already done so to achieve full compliance with the requirements of the law.

APPENDIX E — RELEVANT STATUTE

29 U.S.C.S. § 204, as amended in 1974, provides, in relevant part:

> **§ 204. Administrator**
>
> **(a) Creation of Wage and Hour Division in Department of Labor; Administrator.** There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator [Secretary], to be known as the Administrator [Secretary] of the Wage and Hour Division. . . .
>
> * * *
>
> (f) **Employees of Library of Congress; administration of provisions by Office of Personnel Management.** . . . the Civil Service Commission [Director of the Office of Personnel Management] is authorized to administer the provisions of this Act . . . with respect to any individual employed by the United States . . .